Supreme Court, U.S.
FILED

071281 APR 9 - 2008

OFFICE OF THE CLERK

No. 07-__

IN THE
Supreme Court of the United States

David Kay and Douglas Murphy,
Petitioners,

v.

United States of America,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Reid H. Weingarten
Bruce C. Bishop
David M. Fragale
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, DC 20036
Counsel for David Kay

Thomas C. Goldstein,
Counsel of Record
AKIN, GUMP, STRAUSS HAUER
& FELD LLP
1333 New Hampshire Ave.,
NW
Washington, DC 20036
(202) 887-4060

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Avenue
Bethesda, MD 20814
Counsel for Douglas Murphy

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. When an indictment omits an element of the offense, must it be dismissed, or may such an error instead be excused as harmless? (The Court granted certiorari to decide this question, but did not resolve it, last Term in *United States v. Resendiz-Ponce*, 127 S. Ct. 782, 785-86 (2007).)

2. When the text, structure, and legislative history of a criminal statute are all ambiguous, is the rule of lenity applicable, or instead is that principle limited merely to cases in which the court can only "guess" at Congress's intent?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 10

I. Certiorari Should Be Granted To Determine Whether The Omission Of An Element Of An Offense From An Indictment Can Be Harmless Error 11

II. Certiorari Should Be Granted To Decide Whether The Rule Of Lenity Applies To Ambiguous Statutes Only When All Indications Of Congressional Intent Leave A Court In Equipoise 17

CONCLUSION 35

APPENDICES

APPENDIX A: United States Court of Appeals for the Fifth Circuit Opinion of October 24, 2007 ..... 1a

APPENDIX B: United States Court of Appeals for the Fifth Circuit Opinion of February 4, 2004 .... 53a

APPENDIX C: United States District Court for the Southern District of Texas, Houston Division, Opinion of April 18, 2002 ..... 109a

APPENDIX D: Order of the Court of Appeals Denying Petition for Rehearing 122a

APPENDIX E: Judgment of David Kay 131a

APPENDIX F: Judgment of Douglas Murphy 149a

APPENDIX G: Relevant Constitutional and Statutory Provisions..... 166a

TABLE OF AUTHORITIES

Cases

Bifulco v. United States, 447 U.S. 381 (1980).....20, 21
Bouie v. City of Columbia, 378 U.S. 347 (1964).....27
Chapman v. California, 386 U.S. 18 (1967) 16
Chapman v. United States, 500 U.S. 453 (1991).....25
Cheung v. Titan Corp., No. 04-CV-701 (S.D. Cal. 2004) 34
CPSC v. GTE Sylvania, Inc., 447 U.S. 102 (1980).....30
Crandon v. United States, 494 U.S. 152 (1990).....18, 19, 26
Doe v. Chao, 540 U.S. 614 (2004).....28
Hale v. Henkel, 201 U.S. 43 (1906) 15
Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) 28
Hughey v. United States, 495 U.S. 411 (1990)..*passim*
Ladner v. United States, 358 U.S. 169 (1958) 20, 21
McNally v. United States, 483 U.S. 350 (1987) 25
Moskal v. United States, 498 U.S. 103 (1990) 31
Ratzlaf v. United States, 510 U.S. 135 (1994) 19, 26
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).....6, 30
Reno v. Koray, 515 U.S. 50 (1995).....*passim*
Scheidler v. NOW, Inc., 537 U.S. 393 (2003) 25
Smith v. United States, 508 U.S. 223 (1993) 20
South Carolina v. Regan, 465 U.S. 367 (1984).....30
Stirone v. United States, 361 U.S. 212 (1960) 15
United States v. Allen, 406 F.3d 940 (8th Cir. 2005) (en banc), *cert. denied*, 127 S. Ct. 826 (2006).....12
United States v. Barajas-Montiel, 185 F.3d 947 (9th Cir. 1999) 23

United States v. Barnes, 295 F.3d 1354 (D.C. Cir. 2002) 32
United States v. Bass, 404 U.S. 336 (1971) 17
United States v. Cabaccang, 332 F.3d 622 (9th Cir. 2003) (en banc) 22, 23
United States v. Cor-Bon Custom Bullet Co., 287 F.3d 576 (6th Cir. 2002) 12
United States v. Corporan-Cuevas, 244 F.3d 199 (1st Cir. 2001) 12
United States v. DeGasso, 369 F.3d 1139 (10th Cir. 2004) 22
United States v. Du Bo, 186 F.3d 1177 (9th Cir. 1999) 13, 14, 15, 16
United States v. Granderson, 511 U.S. 39 (1994) 20, 21, 23, 24
United States v. Guidry, 456 F.3d 493 (5th Cir. 2006) 22
United States v. Haas, 583 F.2d 216 (5th Cir. 1978) 9
United States v. Higgs, 353 F.3d 281 (4th Cir. 2003) 12
United States v. Kurka, 818 F.2d 1427 (9th Cir. 1987) 14
United States v. Lanier, 520 U.S. 259 (1997) 27
United States v. Laton, 352 F.3d 286 Cir. 2003) 32
United States v. McRee, 7 F.3d 976 (11th Cir. 1993) 33
United States v. Moore, 84 F.3d 1567 (9th Cir. 1996) 23
United States v. Morrison, 536 F.2d 286 (9th Cir. 1976) 16
United States v. Nguyen, 73 F.3d 887 (9th Cir. 1995) 23

United States v. Omer, 395 F.3d 1087 (9th Cir. 2005) 14
United States v. Prentiss, 256 F.3d 971 (10th Cir. 2001) (en banc), *overruling on other grounds recognized by United States v. Sinks*, 473 F.3d 1215 (10th Cir. 2007) 12
United States v. R.L.C., 503 U.S. 291 (1992) 31, 32
United States v. Ray, 21 F.3d 1134 (D.C. Cir. 1994) 24
United States v. Resendiz-Ponce, 127 S. Ct. 782 (2007) 12
United States v. Robinson, 367 F.3d 278 (5th Cir.), *cert. denied*, 543 U.S. 1005 (2004) 12
United States v. Ruiz-Gea, 340 F.3d 1181 (10th Cir. 2003) 22
United States v. Shabani, 513 U.S. 10 (1994) 17
United States v. Spinner, 180 F.3d 514 (3d Cir. 1999) 13
United States v. Titan Corp., No. 05-CR-314 (S.D. Cal. 2005) 34
United States v. Trennell, 290 F.3d 881 (7th Cir. 2002) 12
United States v. Villanueva-Sotelo, 515 F.3d 1234 (D.C. Cir. 2008) 24
United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1993) 33
United States v. West, 393 F.3d 1302 (D.C. Cir. 2005) 24
United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820) 17

Statutes

8 U.S.C. § 1324(a)(2)(B) 23
15 U.S.C. § 78dd-1 ..... 2, 28, 29

15 U.S.C. § 78dd-2 2
15 U.S.C. § 78ff ..... *passim*

Other Authorities

Brief of United States, *United States v. Burgess*, No. 06-11429 (2008) 25
Brief of United States, *United States v. Villanueva-Sotelo*, 515 F.3d 1234 (D.C. Cir. 2008) 24
Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1 ..... 6, 29
H.R. REP. NO. 95-640 (1977) 4, 29
H.R. REP. NO. 95-831 (1977) (Conf. Rep.) 4
H.R. REP. NO. 100-576 (1988) (Conf. Rep.) 5, 29, 30
Low, Lucinda A. et al., *The Foreign Corrupt Practices Act: Coping with Heightened Enforcement Risk, in* THE FOREIGN CORRUPT PRACTICES ACT: COPING WITH HEIGHTENED ENFORCEMENT RISKS 95 (Lucinda A. Low et al. eds., 2007) 34
Newcomb, Danforth, *Recent Trends in FCPA Enforcement, in* THE FOREIGN CORRUPT PRACTICES ACT: COPING WITH HEIGHTENED ENFORCEMENT RISKS 385 (Lucinda A. Low et al. eds., 2007) 33
S. REP. NO. 95-114 (1977) 5
Second Superseding Indictment 7

Sokenu, Claudius O., *FCPA Enforcement after* United States v. Kay*: SEC and DOJ Team Up to Increase Consequences of FCPA Violation, reprinted in* THE FOREIGN CORRUPT PRACTICES ACT: COPING WITH HEIGHTENED ENFORCEMENT RISKS 189 (Lucinda A. Low et al. eds., 2007) 33

PETITION FOR A WRIT OF CERTIORARI

Petitioners David Kay and Douglas Murphy respectfully petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in *United States v. Kay*, No. 05-20604, and *United States v. Murphy*, No. 05-20606.

OPINIONS BELOW

The order of the District Court for the Southern District of Texas (Pet. App. 109a-121a) granting petitioner's motion to dismiss is reported at 200 F. Supp. 2d 681. The opinion of the Court of Appeals for the Fifth Circuit (Pet. App. 53a-108a) reversing the district court's order is reported at 359 F.3d 738. The opinion of the Court of Appeals (Pet. App. 1a-52a) affirming petitioner's conviction is reported at 513 F.3d 432. The order of the Court of Appeals (Pet. App. 122a-130a) denying the petition for rehearing en banc is reported at 513 F.3d 461.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2007. The Fifth Circuit denied the petition for rehearing en banc on January 10, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Appendix to the petition reproduces the relevant provisions of the Constitution and the Foreign Corrupt Practices Act.

STATEMENT OF THE CASE

The Government charged petitioners with violating the Foreign Corrupt Practices Act, which makes it a crime to "willful[ly]" bribe a foreign official to "obtain[] or retain[] business." 15 U.S.C. §§ 78dd-1(a)(1), 78ff(a). The Fifth Circuit held that the indictment's omission of the element of "willful[ness]" was "harmless error" because petitioners were effectively on notice of the charges against them. The court of appeals further concluded—after reviewing the FCPA's statutory text, structure, and legislative history—that it was "ambiguous" whether Congress intended the FCPA to criminalize petitioners' conduct. The court nonetheless refused to apply the rule of lenity because it found some support for the Government's reading of the statute in the legislative history, so that the court was not required completely to "guess" at the FCPA's meaning.

1. The Foreign Corrupt Practices Act (FCPA) prohibits American businesses and their agents from using "the mails or any means or instrumentality of interstate commerce corruptly in furtherance of" a bribe to a foreign official to induce official action "to assist such [business] in obtaining or retaining business for or with . . . any person." 15 U.S.C. §§ 78dd-1(a)(1), -2(a)(1).[1] Individuals may be held criminally liable only for "willfully" violating the statute. *Id.* § 78ff(a).

---

[1] Petitioners were charged and convicted under both §§ 78dd-1 and 78dd-2. Because the operative language of those two sections is the same, the petition refers to only § 78dd-1 throughout.

2. The government indicted petitioners under the FCPA for having approved bribes to Haitian tax officials to reduce the customs duties and taxes paid by an affiliate of their employer, the Rice Corporation of Haiti (RCH). Pet. App. 102a-08a (superseding indictment). The allegations of the indictment related to "a time of political chaos and rampant corruption in" Haiti (*id.* 2a) during which "the standard practice of Haitian government officials was to routinely press companies like RCH to pay for local service, and almost all companies, including RCH's competitors, paid" (*id.*).

3. The district court dismissed the indictment, ruling that the FCPA does not criminalize payments to reduce customs duties and taxes, as opposed to payments intended to secure or retain contracts. App. C, *infra*. The court recognized initially that the phrase "obtain[] or retain[] business" "is ambiguous." *Id.* 113a. The court resolved the ambiguity by studying the statutory history, finding it persuasive that when Congress enacted the FCPA, it conspicuously did not adopt broader alternative bills that clearly would have encompassed the allegations against petitioners. *Id.* 114a-15a. Congress moreover twice "considered and rejected statutory language that would broaden the scope of the FCPA to cover the conduct in question here." *Id.* 120a; *see id.* 115a-16a (citations omitted). The district court accordingly found it unnecessary to consider application of the rule of lenity or principles of due process. *Id.* 121a.

4. On the Government's appeal, the Fifth Circuit reversed. Starting with the FCPA's text, the court of

appeals "agree[d] with the [district] court's finding of ambiguity for several reasons." *Id.* 62a. The statute itself gives no indication of the "proximity of the required nexus between" the bribe and the business to be obtained. *Id.* The terms "business" and "assist" do not help to resolve that uncertainty. *Id.* 63a-64a. The structure of the FCPA "provides little insight into the precise scope of the statute." *Id.* 64a. And the statute's "generic title fails to make one interpretation of the statutory language more persuasive." *Id.* 66a.

Having found the statutory text "ambiguous as a matter of law," the Fifth Circuit sought to divine Congress's intent from the legislative history. *Id.* 67a. The Conference Report on the FCPA was of no assistance because it "merely parrots the statutory language." *Id.* 70a (citing H.R. REP. NO. 95-831, at 12 (1977) (Conf. Rep.), *as reprinted in* 1977 U.S.C.C.A.N. 4121, 4124-25).

The court of appeals then observed that Congress had declined to enact broadly drafted House legislation that would have clearly criminalized petitioners' conduct by making it unlawful to bribe a foreign official "to use his or her influence to affect *any* act or decision." *Id.* 68a (quoting H.R. REP. NO. 95-640, at 7 (1977)) (emphasis added in Pet. App.). Congress instead substituted substantially narrower language drawn from the Senate bill, limiting the prohibition to payments made "to assist [the company] in obtaining, retaining or directing business to any person." Pet. App. 69a (quoting H.R. CONF. REP. 95-831, at 12). The relevant Senate Report provided no guidance regard-

ing the text's meaning. *See id.* 68a (citing S. REP. NO. 95-114, at 17 (1977)).

Citing no particular evidence in the legislative history, the court of appeals nonetheless thought it could identify support for the Government's interpretation in a generalized congressional desire "to prohibit bribery aimed at getting assistance in retaining business or maintaining business opportunities," which the court regarded as "sufficiently broad to include bribes meant to affect the administration of revenue laws." *Id.* 73a.

The Fifth Circuit further reasoned that its gestalt sense that the FCPA as originally enacted reached bribes intended to lower customs and tax obligations was reinforced by "subsequent . . . legislative history." *Id.* 76a. The court of appeals recognized that in 1988 Congress had considered but not enacted an amendment to the FCPA that would have encompassed petitioners' conduct by specifying that "obtaining or retaining business" "includes payments made for the 'procurement of legislative, judicial, regulatory, or other action in seeking more favorable treatment by a foreign government.'" *Id.* 79a (quoting H.R. REP. NO. 100-576, at 918 (1988) (Conf. Rep.)). But the court deemed that fact to have "no bearing" on the statute's meaning because the Conference Report issued after Congress rejected that amendment asserted "that the 'retaining business' language" of the FCPA as originally enacted already encompassed "a payment to a foreign official for the purpose of obtaining more favorable tax treatment." *Id.* 79a (quoting H.R. CONF. REP. NO. 100-576, at 918). The Fifth Circuit considered that statement in the Report to provide significant

support for the Government's position in light of this Court's determination in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969), that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." Pet. App. 80a-81a.

The Fifth Circuit finally reasoned that the Government's construction was supported by Congress's determination in 1998 to implement an Organization for Economic Cooperation and Development Convention. *Id.* 84a-87a (citing Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1 [hereinafter OECD Conv.]). The Fifth Circuit acknowledged that the Convention "prohibits payments to a foreign public official to induce him to 'act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business *or other improper advantage* in the conduct of international business'" (*id.* 84a-85a (quoting OECD Conv., art. 1.1) (emphasis in Pet. App.)), whereas Congress in implementing the Convention conspicuously did not amend the FCPA's "obtain or retain business" provision to track that language. Instead, Congress "chose to add the 'improper advantage' provision to the original list of abuses of discretion in consideration for bribes that the statute proscribes." *Id.* 85a. But in light of its conclusion that the FCPA as originally enacted already broadly encompassed bribery, the court "agree[d] with the Government that there really was no need for Congress" to amend the statute to track the Convention. *Id.* 86a. And according to the court of appeals, the Convention was intended to broadly pro-

hibit bribery, a purpose that "bolster[ed]" the conclusion "that the kind of conduct allegedly engaged in by [petitioners] can be violative of the statute." *Id.* 87a.

The Fifth Circuit declined to consider the application of the rule of lenity to the proper construction of the FCPA. *Id.* 100a n.96. Rather, "[g]iven the foregoing analysis of the statute's legislative history," the Fifth Circuit reinstated petitioners' indictment based on its conclusion that it could not "hold as a matter of law that Congress meant to limit the FCPA's applicability to cover only bribes that lead directly to the award or renewal of contracts." *Id.* 88a.

5. On remand, the Government secured a second superseding indictment that added allegations that petitioners conspired to violate the FCPA, and that Murphy acted to obstruct its administration. Second Superseding Indictment 7-14. Although the FCPA criminalizes only "willful" violations of the statute, 15 U.S.C. § 78ff(a), the Second Superseding Indictment (like the First) did not allege that the defendants acted willfully. *See* Pet. App. 30a. With regard to the initial FCPA charges, the superseding indictment added allegations that petitioners believed that unless they reduced the company's tax liabilities, they would be unable to "realiz[e] an operating profit" in Haiti. Second Superseding Indictment 3. At trial, the prosecution adduced testimony that "'smugglers' were not paying the taxes on imported rice—or not paying a substantial part of the taxes . . . So, they proved to be very tough competitors against Rice Corporation, who was paying a substantial part of the taxes on the imported rice." Pet. App. 8a n.14. Petitioners were convicted on

all counts. Kay was sentenced to thirty-seven months' imprisonment and two years' supervised release. Murphy was sentenced to sixty-three months' imprisonment and three years' supervised release. Both petitioners were also assessed monetary penalties.

6. a. On petitioners' appeal, the Fifth Circuit returned to the FCPA's prohibition on bribery intended to assist a U.S. company in "obtaining or retaining business." App. A, *infra*. This time, the court of appeals addressed the rule of lenity. The Fifth Circuit recognized that, even *after* considering the legislative history, "the business nexus standard is ambiguous," but it held that it could "avoid the rule of lenity" because the task of statutory construction was not reduced to mere "guesswork." *Id.* 6a, 16a. With respect to the relevance of legislative history, the Fifth Circuit recognized that this Court in decisions such as *Hughey v. United States*, 495 U.S. 411, 422 (1990), "attempted to bar legislative history as a means of clarifying ambiguity and avoiding application of the rule of lenity." Pet. App. 17a. But the court of appeals believed that this Court had subsequently "affirmed that legislative history is an appropriate means of clarification under the rule." *Id.* With respect to the degree of ambiguity required to trigger application of the rule of lenity, the court of appeals deemed that principle "a last resort of interpretation" (*id.* 15a), a conclusion it reached from a literal reading of this Court's statement in *Reno v. Koray*, 515 U.S. 50, 65 (1995), that lenity is relevant only when, "after seizing everything from which aid can be derived, [a court] can make no more than a guess as to what Congress intended" (Pet. App. 16a). The Fifth Circuit accordingly held the principle of len-

ity to be irrelevant to its construction of the FCPA in light of the prior panel's determination that it need not "guess" at the statute's meaning because the legislative history provided some support for the Government's view. *Id.* 17a-18a.

b. The Fifth Circuit next rejected petitioners' contention that the jury instructions at trial had omitted the statutory requirement of willfulness. *Id.* 18a-20a; 15 U.S.C. § 78ff(a). The court reasoned that the term "willful" can have any of three meanings in a criminal statute: an intentional act, a knowingly unlawful act, or an act known to violate a particular statute. Pet. App. 21a-22a. The panel concluded that the FCPA did not encompass the final form of willfulness (which is reserved for detailed regulatory schemes)—and it declined to choose between the two less rigorous interpretations—because the jury instructions when read as a whole sufficiently conveyed both. *Id.* 22a.

c. The Fifth Circuit finally addressed the indictment's omission of any allegation that petitioners had acted willfully. *See* 15 U.S.C. § 78ff(a). The court of appeals deemed that error to be "harmless." Pet. App. 30a. According to the court, other language in the indictment sufficiently conveyed the least-rigorous form of willfulness—*i.e.*, "Defendants' *knowing commission* of acts that are unlawful generally and unlawful under the FCPA." *Id.* 31a; *see also id.* 30a (reaffirming prior precedent holding that an "indictment alleging that defendant 'corruptly did endeavor' sufficiently 'charges an intentional act,' which is 'interchangeable with the term willful'" (quoting *United States v. Haas*, 583 F.2d 216, 220 (5th Cir. 1978))). The panel did not assert

that the indictment's terms included allegations sufficient to satisfy a more rigorous interpretation of willfulness—*i.e.*, that petitioners knew that they were violating the law. Rather, the panel concluded with respect to that construction of "willful" that "[t]he indictment's language sufficiently placed Defendants on notice of each element of the crime charged and allowed them to prepare an effective defense." *Id.* 31a.

7. Petitioners sought rehearing, arguing that they could be convicted of "willful[ly]" violating the FCPA only if they knew that they were acting unlawfully (as opposed to merely acting purposefully). In response, the panel issued a further opinion (App. D, *infra*) in which it accepted that a "willful" violation requires proof that petitioners "knew that their conduct was illegal." Pet. App. 130a. *See also id.* 124a n.1. The court then reaffirmed its earlier conclusion that the petit jury instructions, read as a whole, were sufficient to require proof that petitioners knew that their conduct was unlawful. *Id.* 130a ("[T]his case was tried on the basis that the Government had to prove that the Defendants knew that their actions violated the law, although they did not need to prove that they were aware of the specific provisions of the FCPA."). On that basis, the court denied rehearing. *Id.*

REASONS FOR GRANTING THE WRIT

This case presents two critically important and recurring questions in criminal law, both of which have bedeviled the lower courts and require significant further guidance from this Court. The first question presented is whether the omission of an element of an of-

fense from an indictment is subject to automatic reversal as structural error or is instead subject to harmless error review. The need for this Court's review of that question is underscored by the Court's order granting certiorari on the same harmless error question last Term. The second question presented is whether the rule of lenity applies when a criminal statute is ambiguous, or instead only when the court can merely "guess" at the statute's meaning because the Government's position has no support at all. The Fifth Circuit in this case concluded that conduct was criminal based not on the text of the statute itself, but on the general policy underlying the statute and indirect evidence from subsequent legislative history. The court of appeals acknowledged that the statutory text remained ambiguous even after consulting those sources, but held that the rule of lenity was inapplicable because those sources provided *some* evidence of Congress's intent. Although that holding is supported by isolated dicta in a few of this Court's decisions, it cannot be reconciled with this Court's repeated holdings. This Court's review is necessary to resolve that inconsistency, and the significant conflict in the circuits that it has created.

I. Certiorari Should Be Granted To Determine Whether The Omission Of An Element Of An Offense From An Indictment Can Be Harmless Error.

Last Term, this Court granted certiorari to decide whether an indictment's omission of an element of an offense is structural error, or instead may be excused as harmless error. See *United States v. Resendiz-*

Ponce, 127 S. Ct. 782, 785-86 (2007). The Court, however, was unable to answer that important question in *Resendiz-Ponce* because further review determined that the indictment in that case contained no such omission. This case presents an ideal vehicle to finally resolve the recurring circuit conflict.

1. This Court's review is required to resolve a widespread and entrenched conflict in the circuits concerning whether the omission of an element of the offense from a grand jury indictment can be harmless error. The FCPA criminalizes only "willful[]" violations of its provisions. 15 U.S.C. § 78ff(a). The element of "willfulness" thus is critical to stating a criminal offense under that statute; in the absence of "willfulness," there is no crime. However, the indictment in this case entirely omitted the "willfulness" element, as the court of appeals acknowledged. Pet. App. 30a. The court nevertheless held that the omission of that critical element was "harmless." *Id.* That ruling was consistent with prior circuit precedent holding that the failure to include an element of an offense in an indictment "is susceptible to harmless error review." *United States v. Robinson*, 367 F.3d 278, 285-86 (5th Cir.), *cert. denied*, 543 U.S. 1005 (2004). Six other courts of appeals—including two courts sitting en banc—have adopted that same harmless-error rule.[2]

---

[2] *See United States v. Allen*, 406 F.3d 940, 943-45 (8th Cir. 2005) (en banc), *cert. denied*, 127 S. Ct. 826 (2006); *United States v. Higgs*, 353 F.3d 281, 304-07 (4th Cir. 2003); *United States v. Trennell*, 290 F.3d 881, 889-90 (7th Cir. 2002); *United States v. Cor-Bon Custom Bullet Co.*, 287 F.3d 576, 580-81 (6th Cir. 2002); *United States v. Prentiss*, 256 F.3d 971, 981-85 (10th Cir. 2001) (en banc), *overruling on other grounds recognized by United*

The Third and Ninth Circuits, however, have held the opposite. They have ruled that the omission of an essential element of the offense from an indictment is structural error requiring automatic reversal. *See United States v. Spinner*, 180 F.3d 514, 515-16 (3d Cir. 1999); *United States v. Du Bo*, 186 F.3d 1177, 1179-81 (9th Cir. 1999).

Thus, the conflict in the circuits is entrenched, and the issue is an important and recurring one. This case squarely presents the issue and offers this Court an ideal vehicle to resolve the circuit conflict. There is no dispute either that "willfulness" is a critical element of a crime under the FCPA, 15 U.S.C. § 78ff(a), or that the indictment omitted that element.

The court of appeals in this case held that the omission of the element of "willfulness" was harmless, because "[t]he indictment's language sufficiently placed Defendants on notice of each element of the crime charged and allowed them to prepare an effective defense." Pet. App. 31a. The court's reasoning thus depends critically on the dual premises that (i) an indictment need only give a defendant general notice of the offense charged, and (ii) no structural error arises from the failure to afford the grand jury the opportunity to determine independently and in the first instance whether the Government has sufficient evidence of each element of the offense to permit the Gov-

---

States v. Sinks, 473 F.3d 1315 (10th Cir. 2007); *United States v. Corporan-Cuevas*, 244 F.3d 199, 202 (1st Cir. 2001).

ernment to bring its prosecutorial force to bear against an individual.[3]

By contrast, had this case arisen in the Third or Ninth Circuit, the court of appeals would have reversed petitioners' convictions. In those circuits, the failure to allow the grand jury itself to determine whether there was probable cause to believe that petitioners acted willfully—*i.e.*, whether they acted with the intent to violate the law—would have been fatal to the indictment. *See United States v. Omer*, 395 F.3d 1087, 1088 (9th Cir. 2005); *Du Bo*, 186 F.3d at 1180 ("Specifically, the 'failure to include the element of willfulness . . . renders [an] indictment constitutionally defective.'" (quoting *United States v. Kurka*, 818 F.2d 1427, 1431 (9th Cir. 1987))).

---

[3] When the Fifth Circuit initially considered this case after petitioners' conviction, it stated that the error was harmless on the additional ground that, when read as a whole, the indictment sufficiently conveyed an allegation that petitioners acted purposefully. Pet. App. 24a; *see supra* at 8. But the court's opinion denying rehearing abandoned that interpretation of the "willfulness" element and acknowledged that the FCPA requires proof that the defendant intended to violate the law. Pet. App. 123a-24a & n.1 ("[W]e look to the jury instructions as a whole and the context of trial to ensure that the instructions adequately conveyed a requirement that the Government must prove that Defendants knew that their conduct was not legal – 'unlawfulness.'"); *see supra* at 8-9. The only remaining basis for the court of appeals' determination that the omission of the element of willfulness was harmless was thus its generalized sense that the indictment put petitioners on notice of the charges against them. But in any event, it is uncontested that the indictment omitted the required element of willfulness, whatever that term's meaning.

2. This Court's review is also needed because the court of appeals' decision disregards a fundamental constitutional protection for criminal defendants, contrary to precedent from this Court and other circuits. The Fifth Amendment grand jury right is a foundational constitutional guarantee that strikes a critical balance between the rights of the individual and the Government, by interposing the citizenry as a buffer between the individual and the Government's prosecutorial weight. The grand jury guarantee ensures that individuals are not required to face criminal charges, with all of a prosecution's enormous costs and consequences, without the prior intervention and concurrence of a neutral grand jury drawn from the citizenry itself. The roots of this protection run deep: "At common law, 'the most valuable function of the grand jury was . . . to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony . . ..'" *Du Bo*, 186 F.3d at 1179 (quoting *Hale v. Henkel*, 201 U.S. 43, 59 (1906)). Recognizing the central importance of the grand jury right to the federal prosecutorial power, this Court has explained that a defendant has a "substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Stirone v. United States*, 361 U.S. 212, 217 (1960).

The Fifth Circuit's application of harmless-error analysis cannot be reconciled with this Court's recognition of the central role of the grand jury in our constitutional system. The Fifth Circuit permits a defen-

dant to be tried and convicted of an offense despite the fact that a grand jury did not find probable cause for each essential element of that crime. Moreover, because the prosecution depends upon a novel interpretation of the statute, there is substantial doubt whether the grand jury would have found the omitted willfulness element had it been required to do so. By excusing the Government's failure to put before the grand jury the basic question of whether petitioners intended to violate the criminal law, the Fifth Circuit's harmless error rule "deprive[d] the defendant[s] of a basic protection which the guaranty of the intervention of a grand jury was designed to secure." *Russell v. United States*, 369 U.S. 749, 770 (1962).

Accordingly, an indictment that omits an essential element of the offense is not susceptible to harmless error review. An error is harmless only if it can be found "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967). That cannot be said when, as here, the indictment fails to allege an element—indeed, the element that draws the line between criminal and non-criminal conduct—and therefore fails to "properly allege an offense against the United States" at all. *Du Bo*, 186 F.3d at 1180 (quoting *United States v. Morrison*, 536 F.2d 286, 289 (9th Cir. 1976)). In that circumstance, harmless error review is nothing more than a judicial "guess as to what was in the minds of the grand jury at the time they returned the indictment." *Du Bo*, 186 F.3d at 1179 (internal citations omitted). That the Fifth Amendment does not permit.

Finally, a defective indictment raises the issue of whether a trial should have occurred at all. The error is therefore structural because it affects the entire framework of the criminal prosecution. Harmless error analysis does not work when the error eliminates the very basis for the prosecution to proceed.[4]

II. Certiorari Should Be Granted To Decide Whether The Rule Of Lenity Applies To Ambiguous Statutes Only When All Indications Of Congressional Intent Leave A Court In Equipoise.

1. "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 93 (1820). It is accordingly well-settled that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," *United States v. Bass*, 404 U.S. 336, 347-48 (1971), although the lenity principle does not apply in the absence of statutory ambiguity, *e.g.*, *United States v. Shabani*, 513 U.S. 10, 17 (1994). But the question of how much statutory

---

[4] This case perfectly illustrates the perils of substituting post hoc judicial review for grand jury scrutiny prior to a prosecution. Scouring an indictment for some – any – ground on which to characterize displacement of the grand jury as "harmless" can blind the court to the factual context and framework of the indictment. In this case, for example, the panel made a critical error in the reading of the indictment. The court asserted that the indictment alleged that petitioners acted "in violation of their lawful duty." Pet. App. 57a & n.82. But the cited allegation refers only to the conduct of Haitian officials, not petitioners. *Id.* 107a (petitioners' conduct "induc[ed] such foreign officials to do and omit to do acts in violation of their lawful duty").

ambiguity is required is just as plainly unsettled. The language of this Court's opinions and the holdings of multiple courts of appeals evidence the existence of significant confusion and the adoption of widely conflicting rules concerning how weak indirect, nontextual evidence of congressional purpose must be before the rule of lenity will be invoked to resolve a question that than an ambiguous statutory text does not answer.

The Fifth Circuit seemingly recognized that its ruling cannot be reconciled with two of this Court's decisions, *Hughey v. United States*, 495 U.S. 411 (1990), and *Crandon v. United States*, 494 U.S. 152 (1990). Pet. App. 12a, 17a. Those cases not only hold that lenity applies in cases of statutory ambiguity, but they also specifically express deep skepticism of the use of "legislative history as a means of clarifying ambiguity and avoiding application of the rule of lenity." *Id.* 17a (citing *Hughey*).

In *Crandon v. United States*, 494 U.S. 152 (1990), this Court considered whether an anti-bribery statute that prohibited private supplementation of government employees' salaries reached pre-departure payments made by a private sector employer to employees who were leaving the company to begin government service. *Id.* at 154-55. The Fourth Circuit had construed the statute against the defendants, based on inferences drawn from the statutory and legislative history, and from the public policy against conflicts of interest, which in the court of appeals' view "'support[ed] a broad interpretation of its coverage.'" *Id.* at 160. Reversing, this Court noted that "[b]ecause con-

struction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text." *Id.* at 160.

Subsequently, in *Hughey v. United States*, 495 U.S. 411 (1990), this Court considered whether, under the then-governing restitution statute, a criminal defendant convicted of only one offense must make restitution for related offenses that were charged but dismissed. *Id.* at 412-13. To buttress its interpretation of the statute, the Government invoked "the expansive declaration of purpose accompanying" the statute, "portions of the legislative history that reflect[ed] Congress' goal" of ensuring broad recovery by crime victims, and parallel public policy considerations. *Id.* at 420-21. This Court rejected such use of policy and legislative history, stating that even if the statutory language were ambiguous, "longstanding principles of lenity, which demand resolution of ambiguities in criminal statutes in favor of the defendant, preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history." *Id.* at 422 (citing and quoting *Crandon, quoted supra*). *See also Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994).

Some lower courts, including the Fifth Circuit in this case, have nonetheless concluded that decisions such as *Crandon* and *Hughey* have been superseded by dicta in cases like *Reno v. Koray*, 515 U.S. 50, 65 (1995). In *Koray* the Court stated that the rule of lenity "applies only if, 'after seizing everything from

which aid can be derived,' we can make 'no more than a guess as to what Congress intended.'" *Id.* at 65 (quoting *Smith v. United States*, 508 U.S. 223, 239 (1993), and *Ladner v. United States*, 358 U.S. 169, 178 (1958) (internal punctuation omitted in original)).

This language from *Koray* and similar cases has introduced significant confusion regarding the proper application of the rule of lenity. Certiorari should be granted to establish that the "no more than a guess" formulation was not intended to preclude application of the lenity principle when the statutory text is ambiguous.

This Court first employed the "no more than a guess" formulation in *Ladner v. United States*, 358 U.S. 169, 178 (1958). *Ladner*, however, signaled no departure from the historic standards for employing lenity. To the contrary, *Ladner* represented a standard application of the rule: "'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" *Id.* (citation omitted). The Court explained, "This policy of lenity means that the Court will not interpret a federal criminal statute [more harshly] when such an interpretation can be based on no more than a guess as to what Congress intended." *Id.*

This use of the phrase "no more than a guess"—to *support* application of the rule of lenity—continued through *Bifulco v. United States*, 447 U.S. 381 (1980), and *United States v. Granderson*, 511 U.S. 39 (1994).

In each case, this Court invoked the principle that it "will not interpret a federal criminal statute so as to increase the penalty . . . when such an interpretation can be based on no more than a guess as to what Congress intended." *Granderson*, 511 U.S. at 42-43 (quoting *Bifulco*, 447 U.S. at 387, which in turn quoted *Ladner*). But that formulation plainly was not intended to be taken literally, as the Court reaffirmed that "where text, structure, and history fail to establish that the Government's position is *unambiguously correct*[,] we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor" (*id.* at 54 (emphasis added)) and that so long as "*doubts remain*, they must be resolved in accord with the rule of lenity" (*Bifulco*, 447 U.S. at 400 (emphasis added)).

2. Certiorari is also warranted in order to resolve the conflict in the circuits that has been engendered by the inconsistent rhetoric of this Court's precedents.

a. The Fifth Circuit in this case relied on the Court's dictum in *Koray*, *supra*, to establish a nearly insurmountable threshold for the application of the rule of lenity. Based on its conclusion that in light "of the statute's legislative history, we cannot hold as a matter of law that Congress meant to limit the FCPA's applicability" to exclude tax-related bribery (Pet. App. 88a), the court held that the statute was insufficiently ambiguous to permit resort to the rule of lenity. The court held lenity to be "a last resort of interpretation" that "applies only in situations of ambiguity more extreme than here, where, 'after seizing everything from which aid can be derived, [a court] can make no more than a guess as to what Congress intended.'" *Id.* 15a-

16a. *Accord United States v. Guidry*, 456 F.3d 493, 502 (5th Cir. 2006) (rejecting application of lenity because, "[e]ven if we were unable to discern congressional intent from the plain language, the legislative history *suggests* Congress intended to allow admission of other uncharged sexual offenses" (emphasis added)), *cert. denied*, 127 S. Ct. 996 (2007).

The Fifth Circuit is not alone in the exceedingly narrow scope that it affords the rule of lenity. The Tenth Circuit, for example, reads the *Koray* "no more than a guess" formulation to render the rule of lenity applicable "only as a tie-breaker when ordinary means of discerning statutory meaning leave the Court in 'equipoise'" after consulting "'all other techniques for statutory construction.'" *United States v. DeGasso*, 369 F.3d 1139, 1149 (10th Cir. 2004) (quoting *United States v. Ruiz-Gea*, 340 F.3d 1181, 1188 (10th Cir. 2003)).

b. The Fifth and Tenth Circuits stand in direct conflict with decisions of other courts of appeals—including particularly the Ninth and D.C. Circuits—which hold that the rule of lenity applies to ambiguous criminal statutes and moreover that legislative history must be exceptionally clear to resolve textual ambiguities that would otherwise trigger lenity. In *United States v. Cabaccang*, 332 F.3d 622 (9th Cir. 2003), the en banc Ninth Circuit overruled its prior precedent to hold that the transportation of drugs on a domestic flight that travels through international airspace does not constitute "import[ing]" drugs. On the assumption that the governing statute was ambiguous, the court held that "to the extent that any doubt remains, the

scope of the statute is sufficiently ambiguous to invoke the rule of lenity," which requires favoring the defendant unless "'text, structure, and history fail to establish that the Government's position is *unambiguously* correct.'" 332 F.3d at 635 (quoting *Granderson*, 511 U.S. at 54 (emphasis in *Cabaccang*)).

Similarly, in *United States v. Moore*, 84 F.3d 1567 (9th. Cir. 1996), the Ninth Circuit recognized that some legislative history favored the Government's interpretation of a federal firearms law, but concluded that lenity applied because "neither the text of the statute nor its legislative history *clearly* discloses" Congress's intent. 84 F.3d at 1572 (emphasis added). "Statutory construction expanding criminal liability beyond the express terms of a statute is disfavored, absent *strong* indications of legislative purpose." *Id.* (emphasis added and omitted).

Subsequently, in *United States v. Barajas-Montiel*, 185 F.3d 947, 951 (9th Cir. 1999), the Ninth Circuit inferred that a violation of 8 U.S.C. § 1324(a)(2)(B) requires a specific intent to violate the law, notwithstanding that the statute does not expressly "contain[] [that] requirement." The court relied on the reasoning of its prior ruling in *United States v. Nguyen*, 73 F.3d 887 (9th Cir. 1995), which inferred such a requirement in a related immigration provision on the basis of lenity: "If after examining the statutory language and the legislative history we perceive *any ambiguity* regarding Congress's intent to require a showing of criminal intent, we will resolve the ambiguity by implying a *mens rea* element." *Barajas-Montiel*, 185 F.3d at 952 (quoting *Nguyen*, 73 F.3d at 890-91) (emphasis added).

In *United States v. Villanueva-Sotelo*, 515 F.3d 1234 (D.C. Cir. 2008), the D.C. Circuit held that a defendant "knowingly transfers, possesses, or uses, without lawful authority" another person's identification only if he knows the identification belongs to someone else, as opposed to merely being forged. The court deemed the statutory text "ambiguous," concluding that both the defendant and government offered "plausible" interpretations. *Id.* at 1237-38. The court was willing to assume that the legislative history did not clearly resolve the question, and, although it cited to the "no more than a guess" formulation of *Koray*, the D.C. Circuit held that "were we unable to find 'an *unambiguous* intent on the part of Congress[,]' we would 'turn to the rule of lenity to resolve the dispute.'" *Id.* at 1246 (quoting *United States v. West*, 393 F.3d 1302, 1311 (D.C. Cir. 2005)) (emphasis added). The court reiterated that "lenity comes into play when, after resort to the traditional tools of statutory interpretation, reasonable doubt remains as to the statute's meaning." *Villaneueva-Sotelo*, 515 F.3d at 1236; *see also* Br. for U.S. at 22-23, *United States v. Villanueva-Sotelo* (accepting that under principle of lenity, "if the plain language of a statute or its legislative history do not clearly express the intent of Congress, any ambiguity in the statute should be resolved in the defendant's favor"); *West*, 393 F.3d at 1315 (quoting the "no more than a guess" formulation, but adopting the *Granderson* holding that lenity applies "where text, structure, and history fail to establish that the Government's position is unambiguously correct"); *United States v. Ray*, 21 F.3d 1134, 1140 (D.C. Cir. 1994) (explaining that "ambiguity must be resolved in favor of lenity and

against the prosecution," and that prior precedent holding that lenity "applied only to statutes grievously ambiguous" was inconsistent with more recent Supreme Court jurisprudence).

3. Certiorari is also warranted because the Fifth Circuit's interpretation of the rule of lenity is wrong. Under a proper understanding of this Court's precedents, the ambiguity regarding the FCPA's applications called for construing the statute to favor petitioners.

a. The Fifth Circuit set too high a bar to the invocation of the rule of lenity when it held that lenity applies only when all the available tools of statutory construction leave the court entirely at sea regarding the statute's meaning. Pet. App. 15a-16a. This Court's decisions have used a very different standard, applying lenity when standard methods of interpretation do not produce a conclusion that *clearly* supports the Government. *See supra* at 15-18; *see also, e.g.*, *Scheidler v. NOW, Inc.*, 537 U.S. 393, 409 (2003) ("When there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." (quoting *McNally v. United States*, 483 U.S. 350, 359-60 (1987)).[5]

---

[5] Although the Government often invokes the formulation that lenity applies only in case of "grievous ambiguity" (*e.g.*, Br. of United States at 44-46, *Burgess v. United States*, No. 06-11429 (2008)), it overreads that phrase, which in fact means only that lenity is properly invoked if, "after a court has seized everything from which aid can be derived, it is still left with an *ambiguous*

Furthermore, the court of appeals' holding that thin support in attenuated pieces of subsequent legislative history allowed it to "avoid the rule of lenity" (Pet. App. 16a) is irreconcilable with this Court's determination that such indirect indications of congressional intent should rarely be used to resolve ambiguities in criminal statutes against defendants. In decisions such as *Crandon*, *Hughey*, and *Ratzlaf*, where the Court either found or assumed that the statute's language was ambiguous, the Court held that lenity applies notwithstanding that the legislative history or statutory purpose provided some support for the Government's interpretation. In each of those cases, the Court held that because the legislative history did not establish that the Government's interpretation was *clearly correct*, lenity compelled reading the statute to favor the defendant. This Court's refusal to hold defendants liable based on remote indications of legislative purpose follows from the cardinal due process principle that criminal law must put the defendant on notice that his conduct is criminal. *See Hughey*, 495 U.S. at 422. There is no support for the proposition that a citizen should be deemed aware of the generic and isolated evidence of congressional intent that formed the basis of the Fifth Circuit's ruling in this case.

Indeed, the Fifth Circuit relied principally on the "general declarations of policy" (*Hughey*, 495 U.S. at 422) that this Court's decisions hold are not sufficient

---

statute" (*Chapman v. United States*, 500 U.S. 453, 463 (1991) (emphasis added)).

to negate application of the rule of lenity. Citing to nothing in the statutory text or legislative history *at all*, the Fifth Circuit concluded that it need not "guess" at Congress's intent because the FCPA was intended "to prohibit bribery aimed at getting assistance in retaining business or maintaining business opportunities," which it regarded as "sufficiently broad to include bribes meant to affect the administration of revenue laws." Pet. App. 73a. Under this Court's precedents, the fact that Congress's purpose in enacting a statute is encompassing enough to capture petitioners' conduct is not a sufficient basis to construe an ambiguous term in the Government's favor, when the defendant would not otherwise have been on notice of that construction.

Finally, principles of due process strongly reinforce the conclusion that the FCPA cannot properly be construed in this case to criminalize petitioners' conduct. "[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997). Because the Fifth Circuit's construction was "'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) (citations omitted).

b. A proper application of the rule of lenity would construe the FCPA to favor petitioners, not the Government. The lower courts correctly concluded that the best indications of Congress's intent are ambigu-

ous as to whether petitioners' conduct was prohibited. The statute makes it a crime for an individual to "willfully" bribe a foreign official "in order to assist [a U.S. company] in obtaining or retaining business for or with . . . any person." 15 U.S.C. §§ 78ff, 78dd-1. Here, the Government charged petitioners with bribing Haitian officials in order to secure lower customs duties and taxes.

Both of the lower courts correctly recognized that the statutory text, structure, and title are fundamentally "ambiguous" on whether the FCPA criminalizes that conduct. Pet. App. 63a (court of appeals finding that "the ordinary and natural meaning of the statutory language *is* genuinely debatable and thus ambiguous"); *id.* 67a (holding statute "ambiguous as a matter of law"); *id.* 113a (district court concluding the FCPA's "obtain or retain business" language is "ambiguous under these circumstances").

Even resorting to the fiction that citizens look beyond a criminal statute and its known applications, petitioners would have had no reason to believe that their conduct was criminal. The most reliable evidence would have pointed in the opposite direction, under the principle that "Congress' rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government's interpretation." *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2766 (2006) (citing *Doe v. Chao*, 540 U.S. 614, 621-23 (2004)). In 1977, when Congress first enacted the FCPA, it considered but did not adopt the House version of the statute, which broadly would have made it unlawful to bribe a foreign official "to use

his or her influence to affect any act or decision." H.R. REP. NO. 95-640, at 7 (1977). Subsequently, in revising the statute in 1988, Congress considered but did not adopt an amendment that would have expanded the FCPA to provide that obtaining or retaining business "includes payments made for the 'procurement of legislative, judicial, regulatory, or other action in seeking more favorable treatment by a foreign government.'" H.R. REP. NO. 100-576, at 918 (1988) (Conf. Rep.). It also considered the SEC's proposal to criminalize bribes paid to seek advantageous tax treatment, Pet. App. 71a, but declined to adopt that proposal, instead prohibiting only payments made to "obtain or retain business for or with . . . any person." *See id.* 61a (quoting 15 U.S.C. § 78dd-1(a)(1)). Finally, in 1997, in amending the FCPA to implement the OECD Convention, Congress conspicuously elected not to track the Convention's language by prohibiting a bribe "in order to obtain or retain business or other improper advantage in the conduct of international business." OECD Conv., art. 1.1.

On the still more extreme and implausible premise that citizens look beyond the statutory text, its structure, its title, *and* its history to determine the lawfulness of their conduct, petitioners *still* would have found no clear indication that they were breaking the law. As the court of appeals acknowledged, the most relevant sources—the Conference Report on the FCPA and the Senate Report on the bill that became the statute—are both uninformative. Pet. App. 70a, 72a.

The court of appeals nevertheless thought that its construction was supported by the Conference Report

discussing the 1998 amendments to the FPCA, which indicates that the statute applies to bribes intended to secure "more favorable tax treatment" (*id.* 79a-80a (quoting H.R. CONF. REP. NO. 100-576, at 918-19), an assertion that the court of appeals deemed equivalent to "[s]ubsequent legislation" and thus "entitled to great weight" under *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969). That reasoning is deeply flawed. This Court has expressly and repeatedly "rejected the argument that the *Red Lion* rule should be applicable to the Committee Reports that accompany subsequent legislation." *South Carolina v. Regan*, 465 U.S. 367, 378 n.17 (1984) (citing *CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 117, 118 n.13 (1980)). As the district court explained, "the 1988 House Conference Report consists of a belated interpretation of preexisting statutory language by the House, whose attempt to amend pertinent provisions of the statute had failed." Pet. App. 118a. The single statement cited by the Fifth Circuit is accordingly governed by the settled principle that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *CPSC*, 447 U.S. at 117.

4. This case presents the ideal vehicle to directly address the proper application of the rule of lenity to a case in which the text is ambiguous regarding Congress's intent and the Government's position receives merely weak support from the legislative history. Both the district court and court of appeals agreed that the statute's text, structure, and title are ambiguous as a matter of law. Pet. App. 67a; *id.* 113a. The central sources of legislative history—the directly relevant reports, floor materials, and unenacted versions

of the bills—are either silent with respect to the statute's application beyond bribes directly intended to secure commercial contracts, or favor petitioners. *See supra* at 3-6. Indeed, the Fifth Circuit frankly acknowledged that even *after* considering the FCPA's legislative history, the statute's "business nexus standard is ambiguous." Pet. App. 6a.

The court of appeals nonetheless held that lenity was wholly inapplicable because the meager support it previously had identified made it unnecessary to "guess" at Congress's intent. Pet. App. 15a-18a. The case is thus framed as a perfect opportunity to consider whether lenity is, in fact, no more than a "tie-breaker" when a court would otherwise throw up its hands, or whether that principle more fundamentally protects a defendant's right to fair notice, and applies when the statute's text, structure, and legislative history do not permit an individual to know clearly the scope of the criminal prohibition.

Indeed, the Court should use this case to decide whether legislative history is *ever* a sufficient basis to construe an otherwise ambiguous criminal statute expansively against a defendant. A plurality of the Court in *United States v. R.L.C.*, 503 U.S. 291, 305-06 (1992), reiterated that lenity applies if "any ambiguity survive[d]" a review of the statute and its legislative history. The plurality also applied the formulation of *Moskal v. United States*, 498 U.S. 103, 108 (1990), that lenity applies when "a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute." *R.L.C.*, 503 U.S. at 305-06.

And the Court reinforced that legislative history will "rare[ly]" avoid application of lenity and that "'general declarations of policy,' whether in the text or the legislative history, will not support construction of an ambiguous criminal statute against the defendant." *Id.* at 306 n.6 (quoting *Hughey v. United States*, 495 U.S. at 422). But responding to three Justices who, recognizing the "tension in our precedents," would have held that "it is not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history" (503 U.S. at 311, 308 (Scalia, J., joined by Kennedy and Thomas, JJ.)), the plurality left open the possible adoption of the concurrence's view that legislative history should be irrelevant to the application of the rule of lenity, noting that the issue was "not raised and need not be reached in the case." *Id.* at 306 n.6. This case squarely presents the issue for the Court's decision.[6]

---

[6] Leading appellate judges have voiced their strong dissent from the view that legislative history can provide citizens with sufficient notice. *E.g.*, *United States v. Laton*, 352 F.3d 286, 314 (6th Cir. 2003) (Sutton, J., dissenting) ("Because 'the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal,' and because no one can plausibly conclude that a committee report or the floor statements of selected legislators provides such warning, the use of such material seems utterly incompatible with the purposes of the rule or the civilized interests it protects.") (citations omitted); *United States v. Barnes*, 295 F.3d 1354, 1370 (D.C. Cir. 2002) (Sentelle, J., dissenting) ("That a snippet of legislative history is more consistent with the less lenient application of a criminal statute hardly erodes the laudable principles of the rule of lenity. . . . [I]t seems to me most inconsistent with fundamental fairness and certainly with the rule of lenity to suppose that for a defendant to understand that his conduct is illegal, he must read not only the words

5. Whether the FCPA reaches petitioners' conduct is a question of substantial recurring importance. Because investigating and prosecuting FCPA violations is a high priority for the DOJ, the SEC, and the FBI,[7] it is critical that the scope of the FCPA be properly defined by the courts. In the thirty-six months following the Fifth Circuit's ruling in petitioners' case, the SEC brought more FCPA enforcement actions than during any prior three-year period,[8] and in 2007, targeted companies paid the largest civil fine and the largest criminal fine in the history of the FCPA.[9] The height-

---

of the statute, but find and construe the abstruse comments of a single senator on a single day."); *United States v. Weitzenhoff*, 35 F.3d 1275, 1295 (9th Cir. 1993) (opinion of Kleinfeld, J., for five judges dissenting from the denial of rehearing en banc) ("Instead of applying the rule of lenity, as it was required to do, the panel, after identifying the ambiguity, said '[w]e turn, then, to the legislative history of the provision at issue to ascertain what Congress intended.' That is not an appropriate way to resolve an ambiguity in a criminal law."); *United States v. McRee*, 7 F.3d 976, 985 (11th Cir. 1993) (Birch, J., dissenting) (rule of lenity violated by resort to "a declaration of policy that seeks to close statutory gaps").

[7] Claudius O. Sokenu, *FCPA Enforcement after* United States v. Kay*: SEC and DOJ Team Up to Increase Consequences of FCPA Violation, reprinted in* THE FOREIGN CORRUPT PRACTICES ACT: COPING WITH HEIGHTENED ENFORCEMENT RISKS 189, 207-08 (Lucinda A. Low et al. eds., 2007) [hereinafter HEIGHTENED ENFORCEMENT RISKS]. The SEC's Enforcement Director announced in 2004 that the SEC intended to "aggressively" pursue FCPA violations, and an FBI official stated in 2006 that FCPA and corruption investigations were a high priority, surpassed only by counter-terrorism and counter-cyber-intelligence. *Id.* at 207-08 & n.8.

[8] *Id.* at 208.

[9] Danforth Newcomb, *Recent Trends and Patterns in FCPA Enforcement, in* HEIGHTENED ENFORCEMENT RISKS, *supra* note 7, at 385, 388.

ened level of enforcement raises the stakes for corporations and their directors, officers, and employees, who may be subject to both federal enforcement and private civil suits based on alleged FCPA violations. *See, e.g., United States v. Titan Corp.*, No. 05-CR-314 (S.D. Cal. 2005); *Cheung v. Titan Corp.*, No. 04-CV-701 (S.D. Cal. 2004). Most federal cases against corporations are settled,[10] likely because businesses seek desperately to avoid the publicity associated with enforcement actions. It will be rare that charges are litigated as far as a court of appeals, let alone all the way to this Court. There would thus be little benefit to waiting for further percolation of the question presented, which will occur slowly if at all, while the delay will expose corporations and individuals to uncertainty and the risk of prosecution and other legal action. Consequently, petitioners' case offers an indispensable opportunity for this Court to definitively resolve the scope of the FCPA's "obtaining or retaining business" element.

---

[10] Lucinda A. Low et al., *The Foreign Corrupt Practices Act: Coping with Heightened Enforcement Risk*, *in* HEIGHTENED ENFORCEMENT RISKS, *supra* note 7, at 95, 109-10.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Reid H. Weingarten
Bruce C. Bishop
David M. Fragale
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, DC 20036
Counsel for David Kay

Thomas C. Goldstein,
Counsel of Record
AKIN, GUMP, STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4060

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Avenue
Bethesda, MD 20814

Counsel for Douglas Murphy

April 9, 2008

APPENDICES

APPENDICES

APPENDIX A: United States Court of Appeals for the Fifth Circuit Opinion of October 24, 2007 .....1a

APPENDIX B: United States Court of Appeals for the Fifth Circuit Opinion of February 4, 2004 ....53a

APPENDIX C: United States District Court for the Southern District of Texas, Houston Division, Opinion of April 18, 2002 .....109a

APPENDIX D: Order of the Court of Appeals Denying Petition for Rehearing 122a

APPENDIX E: Judgment of David Kay 131a

APPENDIX F: Judgment of Douglas Murphy 149a

APPENDIX G: Relevant Constitutional and Statutory Provisions.....166a

APPENDIX A

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

Nos. 05-20604

UNITED STATES OF AMERICA, Plaintiff-Appellee

v.

DAVID KAY; DOUGLAS MURPHY, Defendants-Appellants

October 24, 2007

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

Before HIGGINBOTHAM, BARKSDALE and CLEMENT, Circuit Judges.

David Kay and Douglas Murphy, executives at an American company that exported rice to Haiti in the 1990's, paid Haitian officials to reduce duties and taxes on their rice. Kay disclosed this activity to the attorney for his employer, the SEC investigated, and Murphy and Kay were prosecuted for violating the Foreign Corrupt Practices Act ("FCPA" or "the Act"). The district court dismissed the indictment, concluding that the FCPA did not cover bribes to reduce duties and taxes. We reversed the dismissal of the indictment and remanded to the district court, finding that no

prior law clearly controlled the issue but that the indictment fell within the scope of the FCPA. On remand, a jury convicted both Defendants of the counts charged in the indictment. We now affirm the FCPA and obstruction of justice convictions.

I

American Rice, Inc. ("ARI") is a publicly-held company incorporated in Texas and based in Houston that exports rice to various parts of the world. It exported rice to Haiti in the 1990's, a time of political chaos and rampant corruption in that country, through Rice Corporation of Haiti ("RCH"), a subsidiary incorporated in Haiti. During that time, Murphy was ARI's President and Kay was its Vice President for Caribbean Operations.

Haiti levied both duties and taxes on rice importers. ARI, through Murphy and Kay, took various steps to reduce those costs: purchasing from government officials licenses, called "franchises," permitting charities to import food without duty; paying for a "service corporation" designation for RCH, which allowed the company to avoid paying sales and income taxes by claiming that it did not actually own the products it was importing; underreporting imports to reduce duties and taxes and paying officials to accept the underreporting; and paying officials to resolve another tax issue. While these payments, if made domestically, would surely pose serious issues of criminal liability, the standard practice of Haitian government officials was to routinely press companies like RCH to pay for local service, and almost all companies, including RCH's competitors, paid. In

short, paying officials for government service and escape from obstacles to business including taxes was "business as usual" in Haiti during the 1990's.

In 1999, ARI retained a prominent Houston law firm to represent it in a civil suit. Preparing for this suit, the lawyers asked Kay for background information on ARI's rice business in Haiti. Kay volunteered that he had taken the actions mentioned above, explaining that doing so was part of doing business in Haiti. Those lawyers informed ARI's directors. The directors self-reported these activities to government regulators.

The SEC launched an investigation into ARI, Murphy, and Kay. Murphy and Kay were eventually indicted on twelve counts of violating the FCPA, 15 U.S.C. §§ 78dd-2, 78ff, which makes it a crime to (1) "willfully;" (2) "make use of the mails or any means or instrumentality of interstate commerce;" (3) "corruptly;" (4) "in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to;" (5) "any foreign official;" (6) "for purposes of [either] influencing any act or decision of such foreign official in his official capacity [or] inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official [or] securing any improper advantage;" (7) "in order to assist such [corporation] in obtaining or retaining business for or with, or directing business to, any person." The Government never charged ARI, or Defendants civilly, under the FCPA.

In 2002, the district court granted a motion to dismiss the indictment, concluding that "payments to foreign government officials made for the purpose of reducing customs duties and taxes [do not] fall under the scope of 'obtaining or retaining business' pursuant to the text of the FCPA"[1] (*Kay I*). This court reversed on appeal (*Kay II*). After a rigorous analysis of the FCPA and its legislative history, we concluded that "in diametric opposition to the district court ... [,] that bribes paid to foreign officials in consideration for unlawful evasion of customs duties and sales taxes *could* fall within the purview of the FCPA's proscription," but "[i]t still must be shown that the bribery was intended to produce an effect-here, through tax savings-that would 'assist in obtaining or retaining business.'"[2] The panel left to the district court on remand whether further prosecution of this case would deny Defendants due process for want of fair warning.

Back in district court, the Defendants moved to dismiss for lack of fair warning. The district court denied the motion. The Government then filed a superseding indictment repeating the first twelve counts but also charging both Defendants with conspiracy to violate the FCPA and Murphy with obstruction of justice for making false statements to the SEC during its investigation. A jury in Houston found Defendants guilty on all counts. Defendants renewed their lack of fair warning argument in post-

---

[1] *United States v. Kay*, 200 F.Supp.2d 681, 682 (S.D. Tex. 2002).

[2] *United States v. Kay*, 359 F.3d 738, 756 (5th Cir. 2004).

trial motions to dismiss and arrest judgment, which the court denied. Murphy and Kay appeal, asserting several grounds, including lack of fair warning.

II

Defendants argue that the statute failed to give fair notice that their conduct was illegal and that proceeding to trial with the late arriving clarification of the Act violated their due process rights. The district court denied Defendants' motion to dismiss the indictment and the jury convicted Kay and Murphy. This court reviews *de novo* the district court's denial of a motion to dismiss an indictment.[3] We also review *de novo* the underlying substantive issue of whether application of this court's last opinion in this case violates the Due Process Clause.[4]

Bouie provides the appropriate standard of fair notice in the present case. The Supreme Court in *Bouie* recognized two fair notice concerns in criminal statutes, including the vagueness of the statute's language and courts' retroactive enlargement of the scope of a statute, whether the statutory language underlying that enlargement is clear on its face or vague.[5] The Court only applied the latter principle of retroactive enlargement to the facts in *Bouie*, however,

---

[3] *United States v. Wilson*, 249 F.3d 366, 371 (5th Cir. 2001).

[4] *Cf. De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) ("We review due process challenges *de novo*.")

[5] *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964).

since the terms of the statute were clear.[6] *Lanier* expanded upon these standards, in a manner consistent with *Bouie*, and summarized two additional tests for fair notice: the rule of lenity, and a "touchstone principle" of fair notice, which combines the standards of statutory vagueness and judicial enlargement to determine fair notice.[7]

Kay and Murphy address all four of the *Lanier* standards of fair notice in their appeal[8]: 1) enforcement of a vague statute, 2) the rule of lenity, 3) retroactive application of a "novel" interpretation of a statute, and 4) whether the statute, "standing alone or as construed," made the law reasonably clear when the criminal conduct occurred.[9] Under the fair notice principle of vagueness, they argue that this court's "finding that the statute was ambiguous as a matter of law . . . should have led the Court to dismiss this prosecution under the vagueness doctrine . . . ."[10] Although Defendants argue, and we agreed in *Kay II*, that the business nexus standard is ambiguous,[11] it does not follow that the standard requires guesswork or that the statutory language itself is vague.

---

[6] *Id.* at 351.

[7] *United States v. Lanier*, 520 U.S. 259, 266-67 (1997).

[8] Each defendant has adopted the other's arguments.

[9] *Lanier*, 520 U.S. at 266-67.

[10] Kay Br. at 53.

[11] *Kay II*, 359 F.3d at 746-47.

The Court in *Lanier* defines a vague statute as one "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[12] The FCPA delineates seven standards that may lead to a conviction. All are phrased in terms that are reasonably clear so as to allow the common interpreter to understand their meaning. Defendants have, rather than showing vagueness, raised a technical interpretive question as to the exact meaning of "obtaining or retaining" business. Whether "obtaining or retaining" business covers the general activities that an entity undertakes to ensure continued success of a business or Defendants' more limited definition of contractual business is an ambiguity but not one that rises to the level of vagueness and unfair notice.

Nor is the FCPA's business nexus test vague under *McBoyle*, which originally defined the vagueness standard in the context of fair warning. Similar to *Lanier*'s "common intelligence" test, the *McBoyle* test for vagueness requires that "fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed . . . : so far as possible the line should be clear."[13] Imprecise general language in one of seven requirements for a bribery conviction under the FCPA does not draw a line so vague that Defendants were not reasonably aware of their

---

[12] *Lanier*, 520 U.S. at 266.

[13] *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

potential for engaging in illegal activity under the FCPA when they made payments to Haitian officials to reduce tax and duty burdens through misrepresentation. Although ARI did not make corrupt payments to guarantee one particular contract's success, ARI ensured, through bribery, that it could continue to sell its rice without having to pay the full tax and customs duties demanded of it. Trial testimony indicates that ARI believed these payments were necessary to compete with other companies that paid lower or no taxes on similar imports[14] - in other words, in order to retain business in Haiti, the company took measures to keep up with competitors.[15] The fact that other companies were guilty of similar bribery during the 1990's does not excuse ARI's actions; multiple violations of a law do not make those violations legal or create vagueness in the law.

A man of common intelligence would have understood that ARI, in bribing foreign officials, was treading close to a reasonably-defined line of illegality.

---

[14] Lawrence Henry Theriot, a consultant to ARI who provided "the eyes and ears of what the company needed to be alert to," discussed how "Haitian authorities were very aggressive in trying to collect the full amount of . . . taxes from Rice Corporation" and "'smugglers' were not paying the taxes on imported rice - or not paying a substantial part of the taxes . . . So, they proved to be very tough competitors against Rice Corporation, who was paying a substantial part of the taxes on the imported rice."

[15] We reached a similar conclusion in *Kay II*, finding that "[b]ribing foreign officials to lower taxes and customs duties certainly can provide an unfair advantage over competitors and thereby be of assistance to the payor in obtaining or retaining business." 359 F.3d at 749.

As the Supreme Court in *Boyce* held, "no more than a reasonable degree of certainty can be demanded [in a criminal statute]. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."[16] Defendants took this risk, and splitting hairs as to the illegality of one type of action under the business nexus test does not allow them to argue successfully that the FCPA's standards were vague.

In addition to arguing that the statutory language was vague, Defendants, although recognizing that this court must apply its own precedent established by *Kay II*, alternatively assert that the district court erred in its retroactive application of *Kay II*'s interpretation of the FCPA to them. They argue that "*Kay II* extended criminal liability under the FCPA beyond the explicit

---

[16] *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952). *Boyce* is a void for vagueness case but still applies in this case. The Court in *Bouie* clarified the distinction between "void for vagueness" and "fair notice" and the applicability of the void for vagueness test to fair notice questions. When a statute is void for vagueness, the language on its face is unclear. A statute that fails to provide fair notice, on the other hand, may be clear or unclear on its face but regardless, is applied to conduct outside of the scope of the statute, thus retroactively punishing the defendant for an act that he could not have reasonably expected to fall under the statute's prohibitions. The Court found that the fair notice doctrine is broader than the void for vagueness doctrine, since a conviction under a statute can violate the fair notice doctrine when a statute is void for vagueness or when a defendant is retroactively punished under an "expansion" of a clear statute. Void for vagueness analysis is, however, therefore, still applicable to the question of vagueness in a fair notice case. *See Bouie*, 378 U.S. at 351-52.

terms of the Act."[17] In doing so, Defendants misconstrue *Lanier*'s and *Bouie*'s test for fair notice under retroactive application of a law. The *Bouie* fair notice test for retroactive enlargement ("where construction unexpectedly broadens a statute which on its face had been definite and precise"[18]) asks whether a court has held an individual "criminally responsible for conduct which he could not reasonably be proscribed" due to the statute's failure "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden . . . ."[19] Similarly, the *Lanier* fair notice test for judicial expansion of the scope of a statute is whether the court applied a "novel construction" of the statute to conduct not addressed by the statute or by previous cases. In *Bouie*, the state court had retroactively added a distinct category of illegal conduct to the statute - finding that individuals who remained in a restaurant after being asked to leave violated a statute that had previously only prohibited entry onto land after notification that such entry was illegal.[20] The state court, in expanding the trespass statute, drew upon the civil, not the criminal law, of trespass.[21]

---

[17] Kay argued: "Because *Kay II* extended criminal liability under the FCPA beyond the explicit terms of the Act, defendant could not have had fair notice at the time of their conduct that the conduct was subject to criminal punishment under *Kay II*."

[18] *Bouie*, 378 U.S. at 353.

[19] *Id.* at 351.

[20] *Id.* at 349-50.

[21] *Id.* at 357-58.

We are not persuaded that this court in *Kay II* or the district court in applying it, expanded the scope of the FCPA or created a new and independent principle of law. The explicit terms of the FCPA do not include either language relating specifically to contracts or defining more general business practices that may fall under the business nexus test, with the exception of the Act's allowance of "grease" payments. We are not persuaded that the district court's determination that the facts of the case fell within the FCPA's terms of illegality extended the Act beyond its explicit terms.

Our in-depth investigation of one factor's - the business nexus test's - applicability to a specific action, out of a total of seven factors that define illegal bribery under the FCPA, was not an extension of the Act's terms but rather an interpretation and application of its meaning to the facts of the case. A person of common intelligence should have been reasonably aware of this meaning in the 1990's. Paying taxes and customs duties is inherent to foreign business, and decreasing these payments through bribery, as Defendants have admitted, was common practice in Haiti. If bribery to obtain favorable tax and customs obligations was indeed as common as established in the record, then it is reasonable to imply that businesses viewed these practices as one of the only guarantees of maintaining a successful business in Haiti in the 1990's. It is not therefore a novel application of the law for the district court to find that Defendants made these payments for the purpose of "retaining business."

Defendants rely to a large extent on this court's investigation of the FCPA's legislative history in

arguing that the district court retroactively applied law beyond the original scope of the Act, and they assert that "[r]eliance on legislative history (much less history as sparse as the FCPA's) to resolve the meaning of a criminal statute is rarely appropriate." We do not agree. As we discuss in further detail when we turn to the rule of lenity, the Supreme Court has found, since *Crandon*[22] and *Hughey*,[23] that courts should rely on all available sources, including legislative history, when interpreting a potentially ambiguous statute and should find ambiguity only when none of those sources adequately resolve the issue.[24] This court's investigation of the FCPA's legislative history does not indicate that in interpreting the Act, we required the district court to use a novel application of the law or that the FCPA is vague. Rather, the history serves as additional support for the court's resolution of the ambiguity of the business nexus test. This Court looked to numerous aspects of the Act - its text, its title, its "grease payments" exception, the dictionary definition of "business," and the Act's legislative history. And although we found that "the statute itself" was "amenable to more than one reasonable interpretation" and therefore "ambiguous as a matter of law"[25] absent its legislative history, this does not indicate that we established a new interpretation of the law.

---

[22] *Crandon v. United States*, 494 U.S. 152 (1990).

[23] *Hughey v. United States*, 495 U.S. 411 (1990).

[24] *See infra* note 40 and accompanying text.

[25] *Kay II*, 359 F.3d at 746.

A third test under *Lanier* - that case's "touchstone principle" - raises similar questions of retroactivity and vagueness in asking "whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal."[26] This addresses both interpretation of the statute "standing alone" and a court's enlargement of a statute in "construfing]" the statute, whether by interpreting the statute or applying relevant case law. The FCPA was just as clear in the 1990's - when Defendants' relevant conduct occurred - as it is today. In *Kay II* we determined that the FCPA was not void for vagueness[27] but rather contained an ambiguous provision. Defendants here fail in their understandable and able effort to inflate the ambiguity of the business nexus test into an issue of unfair notice under vagueness and retroactivity principles.

Defendants also make the most of the impact of sparse prior judicial interpretation, arguing: "In all prior reported prosecutions under the statute, the Government had charged only defendants whose conduct aimed at obtaining or retaining business by, for example, paying a bribe to secure a government contract." This by no means indicates that this narrow type of payment is the only conduct covered by the business nexus test, as suggested. Kay and Murphy's unlucky status as two of the few individuals that the Government has vigorously prosecuted under the Act

---

[26] *Lanier*, 520 U.S. at 267.

[27] *Kay II*, 359 F.3d at 744 n. 16.

does not permit them to argue successfully that they were unaware of the boundaries of illegality under the Act in the 1990's. As the Court in *Lanier* points out, the lack of prior court interpretations "fundamentally similar"[28] to the case in question does not create unfair notice. Defendants cannot therefore rely on the fact that courts have only interpreted the meaning of the business nexus test in the context of contracts to argue that they had inadequate notice of other reasonable applications of that test.

The Supreme Court has held that a defendant received fair notice under retroactive applications of law broader than *Kay II*'s clarification of the ambiguity of a statute. In *Rogers*, for example, the Court upheld the Tennessee Supreme Court's retroactive abolition of the infrequently-used common law principle that a defendant could not be found guilty of murder if the victim survived the injury by at least a year and a day.[29] The Court found that although Tennessee had not officially abolished the principle when the murder occurred, the law's rarity and the fact that many other jurisdictions had abolished it should have alerted defendant to the possibility that the law was no longer applicable.[30] Courts daily analyze the law's "fit" with the criminal act in question, and without some flexibility of interpretation and clarification, courts would be unable to apply effectively criminal laws to the specific

---

[28] *Lanier*, 520 U.S. at 269.

[29] *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001).

[30] *Id.* at 464.

facts of each case. As *Rogers* states, courts require "substantial leeway . . . as they engage in the daily task of formulating and passing upon criminal defenses and interpreting such doctrines as causation and intent, reevaluating and refining them as may be necessary to bring the common law into conformity with logic and common sense."[31] To find unfair notice whenever a court specified new types of acts to which a criminal statute applied would stifle courts' ability to interpret and fairly apply criminal statutes.

When a statute is not vague but contains ambiguity, as occurs here under the FCPA, we must still consider the rule of lenity: while the "touchstone" of fair notice is reasonable clarity of the illegality of conduct when it occurred, "the touchstone of the rule of lenity is statutory ambiguity."[32] As the Court in *Lanier* applied the lenity doctrine, it "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered."[33] The rule is, however, a last resort of interpretation,[34] and "[t]he mere possibility of articulating a narrower construction [or an act] . . . does not by itself make the rule of lenity applicable."[35] The rule only applies in situations of ambiguity more extreme than here,

---

[31] *Id.* at 461-62.

[32] *Moskal v. United States*, 498 U.S. 103, 108 (1990) (internal quotations omitted).

[33] *Lanier*, 520 U.S. at 266.

[34] *Moskal*, 498 U.S. at 108.

[35] *Smith v. United States*, 508 U.S. 223, 239 (1993).

where, "after seizing everything from which aid can be derived, [a court] can make no more than a guess as to what Congress intended."[36] To address potential statutory ambiguity, the Supreme Court has relied upon "common usage,"[37] dictionaries,[38] the societal circumstances surrounding the passage of an act,[39] legislative intent derived from the language of an act,[40] and legislative history[41] to clarify a law's meaning and thus avoid the rule of lenity. In *Dixson*, where petitioners argued that they did not fall within the scope of the federal bribery statute, the Supreme Court (like this court in *Kay II*) found that the words of the statute could support either petitioners' or the Government's interpretation of the statute and that one of the statute's terms was ambiguous. The Court used legislative history to clear up the ambiguity and found that petitioners could not, therefore, rely upon

---

[36] *Reno v. Koray*, 515 U.S. 50, 65 (1995) (internal quotations and citations omitted).

[37] *Smith*, 508 U.S. at 240.

[38] *Id.*

[39] *Id.* (discussing the high rate of drug-related murders in the United States when Congress passed a statute punishing criminals' use of firearms in drug trafficking).

[40] *Id.* at 240 ("Congress affirmatively demonstrated that it meant to include transactions like petitioner's as 'us[ing] a firearm' by so employing those terms . . . .").

[41] *See, e.g., Reves v. Ernst & Young*, 507 U.S. 170, 184 n.8 (1993) ("Because the meaning of the statute is clear from its language and legislative history, we have no occasion to consider the application of the rule of lenity.").

the rule of lenity.[42] Later, the Supreme Court in *Hughey* attempted to bar legislative history as a means of clarifying ambiguity and avoiding application of the rule of lenity,[43] but the Supreme Court and the Fifth Circuit have since affirmed that legislative history is an appropriate means of clarification under the rule.[44] Here, where the legislative history shows that "Congress meant to prohibit a range of payments wider than only those that directly influence the acquisition or retention of government contracts or

---

[42] *Dixson v. United States*, 465 U.S. 482, 491, 496 (1984) (finding that "[i]f the legislative history fails to clarify the statutory language, our rule of lenity would compel us to construe the statute in favor of petitioners, as criminal defendants in these cases" but that Congress was clear in its intent to broadly define the statutory term at issue).

[43] *Hughey v. United States*, 495 U.S. 411, 422 (1990) ("[L]ongstanding principles of lenity . . . preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history."(internal citation omitted)).

[44] *See, e.g., Moskal*, 498 U.S. at 108 ("[W]e have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to the language and structure, legislative history, and motivating policies of the statute."(internal quotations omitted)); *see also Holloway v. United States*, 526 U.S. 1, 10, 12, n.14 (1999) (relying upon legislative history to conclude that Congress did not intend for a crime to be interpreted narrowly, and affirming that "[t]he rule of lenity applies only if, after seizing *everything* from which aid can be derived, ... we can make no more than a guess as to what Congress intended" (emphasis added) (internal quotations omitted)); *United States v. Reedy*, 304 F.3d 358, 367 n. 13 (5th Cir. 2002) (quoting *Moskal*).

similar commercial or industrial arrangements,"[45] the FCPA is not sufficiently ambiguous to merit application of the rule of lenity.

In sum, under all four *Lanier* tests, Defendants have failed to show that the FCPA, and the district court's application of it, failed to provide them fair notice.

III

As Defendants indicate, the Government must prove, and a jury must find beyond a reasonable doubt, that Defendants both corruptly and *willfully* violated subsections (a) or (g) of § 78dd-1 of the FCPA to obtain a criminal conviction under the Act.[46] Here, a jury convicted Defendants on all counts for bribery that induced foreign officials to accept documents containing false reports of the quantities of rice that ARI imported to Haiti, thus reducing taxes and import duties in violation of FCPA, 15 U.S.C. §§ 78dd-1, 78-dd-2. Defendants argue that the district court failed to adequately instruct the jury on the element of willfulness and thus gave improper instructions as to *mens rea*. We disagree.

The court's instructions to the jury indicated that "corruptly" was an element of the offense and defined a

---

[45] *Kay II*, 359 F.3d at 749.

[46] *See* 15 U.S.C. § 78ff(c)(2)(A) ("Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 78dd-1 of this title shall be fined not more than $100,000, or imprisoned not more than 5 years, or both.").

corrupt act as one that is "done voluntarily and intentionally, and with a bad purpose or evil motive of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means." The court also instructed the jury on the definition of an act done "knowingly" (thus incorporating the willfulness element into its instructions) and defined a knowing act as one "done voluntarily and intentionally, not because of accident or mistake." In response to a jury question as to whether "knowledge of the FCPA" could be "considered an accident or mistake," the court referred the jury to its definition of the term "knowingly." Defendants objected to the instruction given to the jury and proposed two alternative jury instructions, thus preserving error.

We review preserved error in jury instructions under an abuse of discretion standard[47] and ask "whether the court's charge, as a whole, is a correct statement of the law and whether it clearly instructs jurors as to the principles of the law applicable to the factual issues confronting them."[48] Under this standard, we must recognize that trial courts have "great latitude" in the court's decision to include or omit jury instructions.[49] The district court abuses its discretion only if a requested instruction "(1) is substantively correct; (2) is not substantially covered

---

[47] *United States v. Daniels*, 281 F.3d 168, 183 (5th Cir. 2002).

[48] *Id.* (internal quotations omitted).

[49] *United States v. Correa-Ventura*, 6 F.3d 1070, 1076 (5th Cir. 1993).

in the charge given to the jury; and (3) concerns an important point in the trial so that the failure to give it seriously impairs the defendant's ability to present effectively a particular defense."[50] We find that the district court's instructions provided clear directions to the jury on all applicable principles of the FCPA and that Defendants' first requested instruction was not substantively correct; and the second, although technically correct but unnecessarily detailed, was substantially covered in the jury charge. Nor did the court's omission of both of the instructions seriously impair Defendants' defense. The instructions still allowed Defendants to argue lack of knowledge of their bad acts, lack of intent to commit bad acts, and, more generally, lack of "corrupt" action.

Defendants did not argue at trial that the court should instruct the jury on a separate element of willfulness, but they proposed two alternatives to the court's instructions on the definition of "corruptly." The alternative instructions would have required that an act done "corruptly" be done "willfully" and "knowingly" *and* with "specific intent" to either "violate the law" (in this case, by knowing that the FCPA prohibited Defendants' actions) or to "achieve an unlawful result by influencing a foreign public official's action in one's own favor."

The FCPA does not define "willfully," and we therefore look to the common law interpretation of this

---

[50] *United States v. Simkanin*, 420 F.3d 397, 410 (5th Cir. 2005).

term[51] to determine the sufficiency of the jury instructions pertaining to the *mens rea* element. The definition of "willful" in the criminal context remains unclear despite numerous opinions addressing this issue. Three levels of interpretation have arisen that help to clear the haze. Under all three, a defendant must have acted intentionally - not by accident or mistake. The first and most basic interpretation of criminal willfulness is that committing an act, and having knowledge of that act, is criminal willfulness - provided that the actions fell within the category of actions defined as illegal under the applicable statute. In these cases, the defendant need not have known of the specific terms of the statute or even the existence of the statute. The defendant's knowledge that he committed the act is sufficient.[52]

The second and "intermediate" level of criminal willfulness requires the defendant to have known that his actions were in some way unlawful.[53] Again, he

---

[51] *See, e.g., Bryan v. United States*, 524 U.S. 184, 193 (1998) (applying the Court's definition of willfulness "unless the text of the statute dictates a different result").

[52] *See, e.g., Staples v. United States*, 511 U.S. 600 (1994) (defendant need only be aware that he has engaged in conduct that meets the statutory definition; he need not know of the statute or his violation of the statute).

[53] *See, e.g., Bryan*, 524 U.S. at 191 nn.12-13, 191-92 (discussing multiple interpretations of criminal willfulness as meaning "not merely voluntarily, but with a bad purpose,""a thing done without ground for believing it is lawful," or "[d]oing or omitting to do a thing knowingly and willfully ... not only [with] a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it" (internal citations and quotations omitted)).

need not have known of the specific statute, but rather he must have acted with the knowledge that he was doing a "bad" act under the general rules of law. Under this intermediate level of criminal common law willfulness, "the Government must prove that the defendant acted with knowledge that his conduct was unlawful."[54]

The strictest level of interpretation of criminal willfulness requires that the defendant knew the terms of the statute and that he was violating the statute. The courts have reserved this category to limited types of statutory violations involving "complex" statutes - namely those governing federal tax law and antistructuring transactions. Although the Fifth Circuit has not addressed the FCPA under this category, the Second Circuit has determined that the FCPA does not fall within this narrow category of complex statutes,[55] and we agree.

The district court's jury instructions captured both the first and second levels of criminal willfulness, but not the third and strictest interpretational level. We find the instructions sufficient, since the strictest interpretation of criminal willfulness is reserved for complex statutes. Under the first and broadest definition of criminal willfulness, the term "knowingly" in the context of willful criminal action "merely

---

[54] *Ratzlaf v. United States*, 510 U.S. 135 (1994).

[55] *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 327 F.3d 173, 181 (2d Cir. 2003) [hereinafter *Stichting*].

requires proof of knowledge of the facts that constitute the offense."[56] For example, a defendant need only have known that he possessed a weapon with the characteristics that fit within the definition of "machinegun" in the relevant statute;[57] he need not have been aware of the statute or that his possession of the gun violated the statute.[58] Indeed, at least one circuit has specifically found that "[k]nowledge by a defendant that it is violating the FCPA - that it is committing all the elements of an FCPA violation - is not itself an element of the FCPA crime."[59] The Court in *Bryan* affirmed that the "traditional rule" for criminal willfulness is that "ignorance of the law is no excuse,"[60] and that cases holding otherwise (requiring actual knowledge of violation of the law) have involved

---

[56] *Bryan*, 524 U.S. at 193.

[57] *Staples*, 511 U.S. at 619 ("[T]he Government should have been required to prove that petitioner knew of the features of his AR-15 that brought it within the scope of the Act").

[58] *Id.* at 620. The Court did not concern itself with the question of knowledge of the law, but rather with wrongfully convicting "gun owners who were wholly ignorant of the offending *characteristics of their weapons . . . .*" *Id.* (emphasis added); *see also Rogers v. United States*, 522 U.S. 252, 254-55 (1998) (plurality opinion) ("It is not ... necessary to prove that the defendant knew that his possession was unlawful or that the firearm was unregistered.").

[59] *Stichting*, 327 F.3d at 181.

[60] *Bryan*, 524 U.S. at 196; *see also Cheek v. United States*, 498 U.S. 192, 199-201 (1991) (discussing the particular complexity of the federal criminal tax laws and the Court's historic interpretation of these law, which led to a separate definition of willfulness for these laws).

unusually complex statutes with the potential to implicate innocent individuals.[61]

The district court, by instructing the jury that a guilty verdict required a finding that defendant acted "voluntarily and intentionally, and with a bad purpose or evil motive of accomplishing either an unlawful end or result," and by including a separate "knowing" instruction, correctly indicated that the jury must identify evidence amounting to "knowledge of facts that constitute the offense" required by the traditional criminal definition of willfulness (which we have described as the first category of willfulness). The court's instructions also substantially covered the requested instruction that Defendants acted "corruptly," meaning they acted "knowingly and dishonestly, with the specific intent to achieve an unlawful result by influencing a foreign public official's action in one's own favor." The instructions suggested that illegal conduct under the FCPA defined the "unlawful end or result" to which the court referred, since the jury had to have some standard by which to gauge lawfulness. Additionally, the instructions correctly indicated that to be guilty under the Act, Defendants must have knowingly (*i.e.*, voluntarily and intentionally) acted with awareness of these unlawful ends.[62]

---

[61] *Bryan*, 524 U.S. at 194-95.

[62] We are disturbed by the jury's confusion in this case as to the criminal intent element. The jury's question to the court of whether "knowingly" meant knowing violation of the FCPA ("Can lack of knowledge of the FCPA be considered an accident or mistake?") indicates that the jury was confused as to whether Defendants had to know specifically that they were violating the

The district court's instructions, in defining the willfulness standard as requiring knowledge that the acts committed were unlawful acts, were also adequate despite their omission of the exact term "specific intent," which was proposed by Defendants in their second instruction. We have defined specific intent crimes as those involving "willful and knowing engagement in criminal *behavior*."[63] To instruct on specific intent, a court should require the jury "to find that [defendant] intended to do something unlawful."[64] The court gave such an instruction here, despite its failure to use the phrase "specific intent." Where we have struck down jury instructions for failure to convey specific intent, we have done so on the grounds that the court mistakenly thought that the crime was

---

FCPA when they acted. But the jury need not have found this. Under our first definition of willfulness, Defendants' knowledge that they were committing the acts of corrupt bribery of foreign officials was sufficient. Given, Defendants' proffered instruction that would have required that a finding that they "knowingly and dishonestly, with the specific intent to achieve an unlawful result *by influencing a foreign official's action in one's own favor*" would have helped the jury understand that the "unlawful ends" in the court's instructions on "unlawful end or result . . . or unlawful method or means" could refer to specific knowledge that one was committing a corrupt act as defined by the FCPA. But even if the jury understood "unlawful ends" in the more general sense - of acting with a bad or unlawful purpose - this is an acceptable definition of criminal willfulness, which we describe as the "intermediate" definition of willfulness and discuss below.

[63] *United States v. Berrios-Centeno*, 250 F.3d 294, 299 (5th Cir. 2001).

[64] *United States v. Burroughs*, 876 F.2d 366, 369 (5th Cir. 1989).

a general intent crime and therefore refused to instruct that the defendant had intended to act unlawfully.[65] Additionally, as discussed in further detail below, Defendants need not have *specifically* known that they were violating the FCPA in this case; only those cases that involve unusually complex statutes require defendants to have specific knowledge that they are violating a statute.[66] Indeed, the district court's jury instructions closely track the language that the Court in *Bryan* approved as correctly defining criminal willfulness.[67]

---

[65] *Id.* at 368-69 (finding that the court mistakenly believed that the drug conspiracy was a general intent crime and that the "[charge] language does not address the requisite intent to break the law by her 'voluntary' actions. It thus does not compensate for the district court's incorrect definition of 'willful' or its omission of any reference to 'specific intent,' 'unlawfulness,' 'purposeful intent to violate the law,' or any like language that would have suggested the need to find specific intent").

[66] *See, e.g., Cheek*, 498 U.S. at 200 ("Congress has ... softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses. Thus, the Court ... interpreted the statutory term 'willfully' as used in the federal criminal tax statutes as carving out an exception to the traditional rule. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws."); *Bryan*, 524 U.S. at 194-95 (distinguishing the cases where "the jury must find that the defendant was aware of the *specific* provision of the tax code that he was charged with violating" (emphasis added)).

[67] *Bryan*, 524 U.S. at 190. The jury instructions in *Bryan* read as follows: "A person acts willfully if he acts intentionally and purposely and with the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law. Now, the person need not be aware of the specific law or rule that

Because there are multiple definitions of criminal willfulness, however, we also look to stricter standards of willfulness to consider whether Defendants' instructions were substantively correct and whether omission of those instructions seriously impaired an effective defense. We find that the district court's jury instructions also capture our second, or intermediate, definition of criminal willfulness - a definition that we commonly follow[68] - that a defendant knew that he was doing something generally "unlawful" at the time of his action. This level of interpretation is stricter than the first because it does not only require that the defendant knew that he was committing an act (an act which, incidentally, falls within the definition of the relevant statute); the defendant must have known that the act was in some way *wrong*. The district court's jury instructions captured this level of intent well with their requirement that the jury find that Defendants acted "with a bad purpose or evil motive."

---

his conduct may be violating. But he must act with the intent to do something that the law forbids." *Id.*

[68] *See, e.g., Burroughs*, 876 F.2d at 368 (describing " 'willfully' " to mean that " 'the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is to say, *with bad purpose either to disobey or disregard the law*' ") (quoting U.S. Fifth Circuit District Judges Association Pattern Jury Instruction (Criminal), Basic Instruction 9A, at 21 (1983) (emphasis added)); *United States v. Wilkes*, 685 F.2d 135, 138 (5th Cir.1982) (upholding instructions that defined "willful as incorporating a 'bad purpose either to disobey or to disregard the law' ").

Finally, the statute here does not fall within the narrow exception to the *Bryan* Court's rule. Under this rare exception (which covers our third and "strictest" level of criminal willfulness), a defendant must know the specific law that he is violating in order to act willfully. The "highly technical" exceptional statutes to which the Court in *Bryan* refers are federal tax laws, for which the Court has explicitly "carv[ed] out an exception to the traditional rule" that ignorance of the law is no excuse,[69] and a complicated statute addressing structuring of cash transactions, where the Court limited its holding specifically to antistructuring laws.[70] We have agreed that willfulness does *not* generally require that the defendant knew that he was violating the specific provisions of a law.[71] Although the Fifth Circuit has not directly addressed this issue in the context of the FCPA, the Second Circuit has held that "[f]ederal statutes in which the defendant's knowledge that he or she is violating the statute is an element of the violation are rare; the FCPA is plainly

---

[69] *Cheek*, 498 U.S. at 200 (citing *United States v. Bishop*, 412 U.S. 346 (1973)); *United States v. Pomponio*, 429 U.S. 10, 12 (1976) (For cases involving tax statutes, the exception defines willfulness as the "voluntary, intentional violation of a known legal duty") (internal quotations omitted).

[70] *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994) ("To establish that a defendant 'willfully violat[ed]' the antistructuring law, the Government must prove that the defendant acted with knowledge that his conduct was unlawful.").

[71] *United States v. Garcia*, 762 F.2d 1222, 1224 (5th Cir. 1985) (rejecting defendant's arguments that the jury instructions were erroneous because they "did not clearly require that the Defendant have knowledge of the particular law allegedly violated.").

not such a statute."[72] Thus, the instructions need not have, as Defendants argued, indicated that the jury "must find that the defendant knew that the Foreign Corrupt Practices Act prohibited American businessmen from providing anything of value to a foreign official in order to obtain or retain business . . . ." This level of specificity was not required here.

The instructions' requirements that Defendants acted corruptly, with an "unlawful end or result," and committed "intentional" and "knowing" acts with a bad motive sufficiently captured the definition of criminal willfulness that we follow. They also allowed Defendants to effectively put forth adequate defenses: Defendants could have argued lack of intent and that they were not acting with knowledge of unlawful means or ends. The district court's jury instructions adequately conveyed the "willfulness" required for a conviction under the FCPA.

IV

Defendants argue that in addition to improperly instructing the jury on the element of willfulness, the district court allowed the jury to convict based on a defective indictment that omitted the element of willfulness. We review this issue *de novo*[73] and will find an indictment to be sufficient if it "alleges every element of the crime charged and in such a way as to enable the accused to prepare his defense and to allow

---

[72] *Stichting*, 327 F.3d at 181.

[73] *United States v. Ratcliff*, 488 F.3d 639, 643 (5th Cir. 2007).

the accused to invoke the double jeopardy clause in any subsequent proceeding."[74]

The second superseding indictment upon which the jury convicted Defendants indeed omitted the term "willful." However, this omission was harmless error at most, as the language of the indictment described the exact type of conduct required for a finding of willfulness. As we discussed in detail in the context of jury instructions, criminal willfulness requires only that criminal defendants have knowledge that they are acting unlawfully or "knowledge of the facts that constitute the offense," depending on the definition followed, unless the statutory text provides an alternate definition of this element.[75] The FCPA does not define willfulness, so we rely upon the common law definition.

The indictment in this case was not required to contain the exact term "willfulness." This court has specifically found that an indictment alleging that defendant "corruptly did endeavor" sufficiently "charges an intentional act," which is "interchangeable with the term willful."[76] Similarly, by alleging that Defendants in this case themselves "paid bribes and authorized the payment of bribes;"[77] "acted on his [sic]

---

[74] *Id.* (internal quotations omitted).

[75] *Bryan*, 524 U.S. at 193.

[76] *United States v. Haas*, 583 F.2d 216, 220 (5th Cir. 1978) (internal quotations omitted).

[77] Second superseding indictment, Count 3.

own behalf and as an agent of American Rice, Inc.,"[78] to reduce customs duties; paid bribes to underreport import quantities because Defendants "believed"[79] that they would otherwise lose sales to competitors; "directed employees"[80] to make false shipping documents; and acted "corruptly"[81] "in violation of their lawful duty,"[82] the indictment sufficiently alleged the element of willfulness by using language that directly asserted Defendants' knowing commission of acts that are unlawful generally and unlawful under the FCPA. The indictment's language sufficiently placed Defendants on notice of each element of the crime charged and allowed them to prepare an effective defense.

V

In addition to arguing that the indictment failed to allege willfulness, Defendants assert that the indictment insufficiently alleged, and the Government failed to prove at trial, that Defendants made "use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value" to

---

[78] *Id.*, Count 6.

[79] *Id.*, Count 3.

[80] *Id.*, Count 5.

[81] *Id.*, Count11.

[82] *Id.*

foreign officials.[83] They claim that the Government only alleged in the indictment and proved at trial that Defendants used barges and similar interstate commerce for the false documents that underreported ARI's imports but failed to allege or prove that these false documents, or any other money or documents, were sent through interstate commerce "in furtherance" of the actual bribes. To the contrary, they argue, "the purpose of the bribe was to clear the way for the acceptance of the shipping documents. That is, the bribes furthered the use of instrumentalities to ship the documents and rice into Haiti, not the other way around."[84] Defendants further allege that "payments were made in person in Haiti, with cash drawn from local bank accounts."[85]

When we review a challenge to the sufficiency of the evidence underlying Defendants' conviction and Defendants have moved for a judgment of a acquittal, as they did here in their Rule 29 motions,[86] we ask "whether a rational juror could have found the

---

[83] 15 U.S.C. §§ 78dd-1(a), -2(a).

[84] Murphy Reply Br. at 4.

[85] Murphy Br. at 8.

[86] Although the Government argues that we should apply a plain error standard of review for sufficiency of the evidence, as Defendants did not object to the jury instructions on the interstate commerce issue in their Rule 29 motions, we need not address this argument; we find that even under a more generous standard of review for Defendants (assuming they properly addressed the interstate commerce element in their Rule 29 motion), Defendants' claim fails.

elements of the offense proved beyond a reasonable doubt. In so doing, we view the evidence in the light most favorable to the government, with all reasonable inferences and credibility choices made in support of the jury verdict."[87] A rational juror could have inferred from the evidence in this case that Defendants used interstate commerce "in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to . . . any foreign official . . . ."

As to the sufficiency of the indictment, the language of the indictment arguably failed to allege that Defendants sent any money for their bribes through interstate commerce,[88] thus requiring us to address Defendants' argument that a defendant can only be convicted under the bribery portion of the FCPA if the defendant used the mails or other interstate commerce "in furtherance of making the

---

[87] *United States v. Valles*, 484 F.3d 745, 752 (5th Cir. 2007).

[88] Even this claim in Defendants' briefs is dubious, as the indictment alleges that "[i]n furtherance of bribes . . . defendants authorized employees of American Rice, Inc. to withdraw funds from American Rice, Inc. bank accounts and to pay these funds to officials of the Haitian government . . ." Second Superseding Indictment, Count 7. This language suggests that Defendants, since their company was based in America, sent funds through interstate commerce from America to Haiti to pay these bribes. Because the language does not specifically indicate this, however, we give Defendants' argument some credence and further address the indictment's allegations of documents, rather than money, that Defendants transported in furtherance of bribes.

bribe itself"[89] and not for more broad use of interstate commerce for activities that support the bribe payment.

This issue does not require us to look to the legislative history or the dictionary, as Defendants would have us do. The plain language of the statute applies to defendants that "make use of . . . any means or instrumentality of interstate commerce . . . in furtherance of an offer, payment, promise to pay, or authorization [to pay] . . . ."[90] The indictment similarly alleges that Kay directed employees to, "in furtherance of ... bribes ... prepare shipping documents ... that falsely represented the weight and value of the rice being exported to Haiti."[91]

Defendants attempt to portray the false shipping documents as a *product of* the bribes and argue that they therefore did not send the documents through interstate commerce "in furtherance" of bribes; rather, they argue, Defendants paid the bribes using cash in Haiti, and these cash bribes allowed ARI to carry a set of false documents with its Haitian-bound cargo. But the indictment alleges, and the evidence shows, a reverse causal chain: ARI used the false documents to calculate the bribes, sending the documents through interstate commerce "in furtherance" of the bribes. Under ARI's "Plan B," Theriot described in testimony how ARI based its bribes to customs officials on the shipping documents: ARI, in its false reports, reduced

---

[89] Murphy Br. at 8.

[90] 15 U.S.C. § 78dd-2.

[91] Second superseding indictment, Count 5.

the quantity of rice that it was importing by 30 percent and paid customs officials 30 percent of this 30 percent reduction to induce the customs officials to continue to accept false documents. Joel Malebranche, a sales and plant manager for ARI in Haiti whose responsibility was to "clear the [ARI] vessels for customs," described in detail how the payments were made based on the false shipping documents. Under Plan B for underreporting the amount of rice imported to Haiti and paying customs officials to accept these underreported amounts, ARI sent two sets of documents for each shipment of rice. With the ship, they sent a stowage plan and invoice indicating the correct quantity of rice on board. Then, through DHL or Federal Express, they sent a set of false documents from Houston to Haiti, reporting lower quantities. These false documents, once they arrived in Haiti, allowed ARI employees to clear the vessel in port by writing a check; Kay calculated the amount to be paid by comparing the accurate and underreported quantities of rice. As an example of this system, Government Exhibit 1A showed the correct quantity of rice on board the vessel (7718 metric tons), while Exhibit 1C, accompanied by a Federal Express slip, showed a quantity of 6218 tons. Malebranche, when asked if he had to "make any payments to customs to cause them to accept these documents," responded that ARI had to make cash payments - which he clarified to consist of "a check to cash, which was then cashed at the bank" and used to pay the bribes - and affirmed that he used the "savings" number calculated by Kay (a fraction of the taxes saved from the underreported amounts[92]) to "calculate how much had

---

[92] Government Exhibit 33, a January 20, 1998 e-mail from Kay,

to be paid to the officials . . . . One third goes to the officials; and two thirds comes to us, to Rice Corporation." Government Exhibit 1G showed an ARI check, based on the calculation of the savings from underreported rice quantities, written to bribe Haitian officials.

The indictment, by alleging that the false documents transported by interstate means were transported "in furtherance" of bribes, accurately tracked the interstate commerce element of the FCPA and was supported by evidence from the case. It placed Defendants on notice as to the crime charged and allowed them to present an effective defense. The indictment and the evidence were therefore sufficient with respect to the interstate commerce element of the FCPA.

VI

During the SEC's investigation, Murphy was subpoenaed to produce documents and provide testimony. He withheld several documents referring to payments to Haitian officials, and denied during testimony knowledge of payment to customs officials or of the falsification of shipping documents.

---

stated, "Share this with Joel then destroy." The exhibit shows the calculations that Kay used to determine, based on the "savings" from the underreported shipping quantities (sent via Federal Express or DHL from Houston to Haiti) as compared to the properly reported quantities (sent on the ship), the payments to customs officials.

Murphy was convicted on the obstruction charge.[93] He argues that the district court abused its discretion by refusing to give a requested good-faith jury instruction on this count. Assuming that Murphy's proffered instruction is substantively correct, we find no abuse of discretion because Murphy's instruction was substantially covered by the actual charge. The district court used the pattern jury instruction, which explains that one element of obstruction is "[t]hat the defendant's act was done 'corruptly,' that is, that the defendants acted knowingly and dishonestly, with the specific intent to subvert or undermine the due administration of justice." Murphy's proffered jury instruction would have added that "good faith on the part of the defendant is simply inconsistent with a finding that the defendant acted with the corrupt intent required . . . . A person who acts, or causes another person to act, on a belief or an opinion honestly held is not punishable under this statute merely because the belief or opinion turns out to be inaccurate, incorrect, or wrong."

The charge was sufficient without Murphy's requested instruction. While counsel understandably wanted the charge to contain the verbal footing for their close, the omission of those wished-for terms was not reversible error. The instruction given required the jury to find that Murphy "knowingly and dishonestly" lied to the SEC, a finding which leaves no room for "good faith" and "honesty." Murphy's argument for inclusion relies heavily on *Arthur Andersen LLP v. United States*, where the Supreme Court vacated an obstruction conviction because a jury instruction, as it

---

[93] 18 U.S.C. § 1505.

read it, permitted the jury to convict where the defendant innocently impeded the government's fact-finding ability.[94] In *Arthur Andersen*, the district court departed from the pattern instruction, removing the word "dishonestly," and with it much of the good-faith defense. Because the district court here followed the pattern instruction, there was no danger under the charge as given that Murphy could have been convicted of violating 18 U.S.C. § 1505 without a corrupt intent. We AFFIRM Murphy's conviction on count 14 for obstruction of justice.

VII

Defendants argue that the district court erred in refusing to admit certified tax receipts on the grounds of inadequate authentication. These documents - consisting of "bordeaus" (customs documents) and memos - would have allegedly shown that following initial underpayments at port, Defendants later engaged in reconciliations with the Haitian government where they substantially paid their taxes owed. Defendants also allege that the bordeaus, which indicate the "amount of rice recorded" in addition to taxes paid, would demonstrate that they mis-reported quantities and underpaid taxes to a lesser extent than claimed by the Government.

Defendants obtained the documents and gave them to the Government several weeks before trial but then sent them back to Haiti for certification. They provided certified copies of the documents to the

---

[94] *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706-07 (2005).

Government the day before trial. The Government objected to the documents' admission on the basis that the documents were certified by the brother of a co-conspirator in the case, that the Government had not had sufficient time to test the documents, and that the documents were originally accompanied by a post stating that they were "Received from Murphy," not from the individual who later certified the documents. The Government argued that the authentication issues were of particular concern because the case dealt with false documentation. Further, Defendants were unable to locate the originals of the documents or explain why they were unavailable. The district court refused to admit the documents and, although not providing an explicit reason, apparently did so under Rule 403 of the Federal Rules of Evidence. We review a district court's exclusion of relevant evidence under Rule 403 for an abuse of discretion,[95] and, if we find an abuse of discretion, we find reversible error only if the ruling affected a substantial right.[96]

To preserve error in an evidentiary ruling excluding evidence under Rule 103(a), a defendant must make an "offer of proof" of evidence, meaning that "the substance of the evidence" must have been "made known to the court by offer" or must have been "apparent from the context within which questions were asked."[97] The defendant need not renew his

---

[95] *United States v. Jimenez*, 256 F.3d 330, 341 (5th Cir. 2001).

[96] *Guy v. Crown Equip. Corp.*, 394 F.3d 320, 324 (5th Cir. 2004); *United States v. Hicks*, 389 F.3d 514, 524 (5th Cir. 2004).

[97] FED.R.EVID. 103(a)(2).

objection to the exclusion of evidence "[o]nce the court makes a definitive ruling on the record admitting or excluding evidence . . . ."[98] If Defendants had failed to make an offer of proof in this case, as the Government claims, then we would not address the court's decision to exclude the evidence.[99] However, a formal offer of proof was not necessary here.[100] By explaining to the court the substance of the proffered evidence (receipts indicating tax payments that Defendants made after shipments were complete) and why the court should admit these documents[101] (describing how the documents had been "subscribed and sworn - and certified by the United States vice counsel"), Defendants made a sufficient "informal" offer of proof. Although Defendants did not renew their attempt to admit the evidence in trial after the court's decision to exclude, the court definitively rejected the evidence in its pre-trial ruling.[102] No further objections by Defendants were necessary.

---

[98] FED R. EVID. 103(a).

[99] *United States v. Winkle*, 587 F.2d 705, 710 (5th Cir. 1979).

[100] *United States v. Clements*, 73 F.3d 1330, 1336 (5th Cir. 1996); *see also United States v. Ballis*, 28 F.3d 1399, 1406 (5th Cir. 1994) ("[E]xcluded evidence is sufficiently preserved for review when the trial court has been informed as to what counsel intends to show by the evidence and why it should be admitted, and this court has a record upon which we may adequately examine the propriety and harmfulness of the ruling").

[101] *See Ballis*, 28 F.3d at 1406 (counsel must demonstrate "what counsel intends to show by the evidence and why it should be admitted.").

[102] *See, e.g., Jimenez*, 256 F.3d at 342-43 (5th Cir.2001) (although "[o]bjecting to an in limine order excluding testimony or evidence

Although Defendants properly objected to the district court's ruling, the district court did not abuse its discretion here. Defendants attempted to introduce the documents at the last minute, and the court could have reasonably concluded that they would create confusion or unfair prejudice. Additionally, the Government provided evidence that the documents were certified by a potentially biased party. Because the district court did not provide reasons (certification, relevance, or others) for the exclusion of the evidence, however, we also determine whether, if there was any error, it was reversible.

Defendants failed to show that their "substantial rights" were affected by the district court's exclusion of the evidence, and therefore the court's decision did not result in reversible error.[103] To show that the court's decision to exclude the evidence affected their substantial rights, Defendants must demonstrate that the ruling "affected the outcome of the proceedings."[104] The jury here could still have found Defendants guilty if the court had admitted the tax documents. Regardless of whether the tax documents presented

---

does not relieve a party from making an offer of proof" at trial, an informal offer of proof may be sufficient "when the trial court makes clear that it does not wish to hear further argument on the issue").

[103] FED.R.EVID. 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.").

[104] *United States v. Cuellar*, 478 F.3d 282, 295 (5th Cir. 2007) (internal quotations omitted).

evidence that Defendants paid a substantial amount of their taxes in later reconciliations with the Haitian government, as Defendants claim, this fails to diminish the weight of the Government's ample evidence demonstrating that Defendants initially based their tax payments on false reports of the quantity of rice they imported, which Defendants then used to calculate bribes to customs officials and to ensure acceptance of further false reports.

Although Defendants also argue that some of the excluded documents demonstrate that they reported more of their rice imports than the Government alleged at trial, they do not suggest that the documents show that Defendants reported the amounts honestly, or in full. Rather, they allege that the excluded evidence would have indicated that "RCH received much less, if any, actual tax benefit from the commission payments it made."[105] The district court had no such evidence that the documents actually demonstrated this - nor do we. And Defendants' claims that they received less "tax benefit" than alleged by the Government skirt the central matter of the case: Defendants underreported quantities of rice and made bribes to continue this false reporting, which in turn allowed for underpayment of taxes and customs duties at port. Whether Defendants actually obtained substantial tax benefits is a collateral matter. The district court did not abuse its discretion in excluding the evidence and, even if it had, Defendants have failed to demonstrate that the court's exclusion of the documents affected their substantial rights by changing the outcome of the case.

---

[105] Murphy Br. at 24.

VIII

The foreign payments in this case came to the attention of the SEC after Kay voluntarily revealed ARI's conduct to company counsel. Kay, however, refused to speak to a second set of investigating lawyers and, when later subpoenaed, he invoked the Fifth Amendment and refused to testify regarding the payments. At trial, Kay disclosed his intent to introduce testimony of his pre-indictment reports at trial, to suggest that his disclosures evidence his belief that his actions had been lawful. Responding to Kay's *in limine* request, the district court defined Kay's exposure to cross examination should he so testify. The district court ruled that the Government would be able ask Kay whether he had appeared before the SEC and whether Kay had been asked to appear, but no more; and that the court would then if requested by Kay instruct the jury on Kay's Fifth Amendment rights.

In some circumstances, Kay's response to this question and the court's jury instructions may have improperly alerted the jury to Kay's invocation of his Fifth Amendment rights and, despite the court's proposed instruction to the jury in its ruling, would have violated the Fifth Amendment protection guaranteed by *Hale*.[106] But here the court's ruling was tailored to prevent Kay from selectively using his Fifth Amendment rights as a "sword," while simultaneously benefiting from the shield created by these rights, and allowed the Government to reasonably respond to Kay's testimony.

---

[106] *United States v. Hale*, 422 U.S. 171, 181 (1975).

Kay correctly asserts that *Hale* erects a fortress around the Fifth Amendment by barring mention in criminal court of a defendant's silence following arrest.[107] Without this protection, the right against self incrimination would be diluted by the high risk that juries might draw a "strong negative inference" from this silence.[108] Although we find, contrary to the Government's assertions, that Kay properly preserved the Fifth Amendment issue under *Luce*, we find no *Hale* violation here.

The Government argues that under *Luce*, Kay failed to preserve the Fifth Amendment issue. Its reliance is misplaced. As the Government admits in its own brief, "this case is not exactly like *Luce*"; in fact, this case bears little resemblance to *Luce*, where the Court found that a defendant must testify in order to preserve claims under Rule 609(a)(1) of the Federal Rules of Evidence.[109] Here, Kay did testify. Although he did not testify regarding his prior statements about payments, Kay's proposed testimony was clear: he proposed to testify that he voluntarily told the company's lawyers about the payments as evidence that he thought the payments were lawful. The court also made clear that it would allow the Government to elicit on cross that Kay refused to respond to the SEC and that it would instruct the jury that Kay had a

---

[107] *Id.*

[108] *Id.* at 180.

[109] *Luce v. United States*, 469 U.S. 38, 41 (1984).

constitutional right to not respond to the SEC.[110] It is true that the district court's initial ruling in *Luce* was "subject to change when the case unfold[ed]," but the Court there was particularly concerned with situations where "defendant's 'actual' testimony [may] differ[] from what was contained in the defendant's proffer."[111] This was not an issue here. Before Kay testified, counsel and the court had made clear the proposed testimony on voluntary disclosure of payments, as well as the court's proposed treatment of that testimony if he chose to offer it. In *Luce*, it was "unknowable."[112]

Kay preserved his Fifth Amendment claim. We find, however, that the district court did not err in its ruling. The Supreme Court has found that when a "prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel,"[113] there is no violation of the Fifth Amendment privilege against self-incrimination. As Justice Stevens put it, "the protective shield of the

---

[110] The district court made it clear in this case that its determination was final, and it made this clarification immediately prior to Kay's testimony. The court confirmed attorney Urofsky's clarification that, if Kay offered evidence that he revealed ARI's activities to his attorneys (thus suggesting he was honest), the court would allow the Government to ask Kay, "Did you talk to SEC?" The court further explained "And then it opens it up for two questions from you [the Government] with my offer of an instruction . . . *that's the end of it.* Okay? No more."(emphasis added).

[111] *Luce*, 469 U.S. at 41.

[112] *Id.*

[113] *United States v. Robinson*, 485 U.S. 25, 32 (1988).

Fifth Amendment should [not] be converted into a sword that cuts back on the area of legitimate comment by the prosecutor on the weaknesses in the defense case."[114] Applying the *Griffin* Court's prohibition against comment on Fifth Amendment silence to "forbid the prosecutor from fairly responding to an argument of the defendant by adverting to that silence"[115] would have been improper here.

Although Appellant's prior initial statements to his attorney may have been consistent with his later invocation of the Fifth Amendment privilege[116] (as required if he wished to receive *Hale* protection),[117] his

---

[114] *United States v. Hasting*, 461 U.S. 499, 515 (1983) (Stevens, J., concurring).

[115] *Robinson*, 485 U.S. at 34.

[116] His post-indictment silence and pre-indictment statements appear to be consistent under all three of *Grunewald* 's tests for consistency. First, although Kay did not speak about the payments after being indicted and therefore made no "repeated assertions" of innocence during proceedings, his initial revelation of the payments demonstrates his belief that he was innocent. *Hale*, 422 U.S. at 178 (citing *Grunewald v. United States*, 353 U.S. 391, 422 (1957)). Second, Kay asserted his right to silence in a secretive proceeding by refusing to speak when subpoenaed. As the Court in *Grunewald* found: "Innocent men are more likely to plead the privilege in secret proceedings, where they testify without advice of counsel and without opportunity for cross-examination." 353 U.S. at 422-23. Finally, Kay reasonably believed that he was a potential defendant when the SEC subpoenaed him, and it was therefore "natural for him to fear that he was being asked questions for the very purpose of providing evidence against himself." *Id.* at 423.

[117] *Grunewald*, 353 U.S. at 418-20 (prosecution may impeach defendant regarding invocation of the Fifth Amendment privilege

pre-indictment silence, when a second set of lawyers wished to inquire further as to his earlier disclosures, is not consistent with his initial disclosure of information. Kay claims that the Government sought Fifth Amendment impeachment "only as a naked quid pro quo, to exact a price for Kay's testimony,"[118] but the record shows otherwise. The Government plausibly argued before the district court that if Kay's attorney cross-examined him on his initial disclosure of ARI's bribery, this would suggest that Kay was "the reporter ... the complainant . . . the one who started this whole thing" - the honest individual who initiated the events leading to the investigation. Kay would have been able to use this testimony to his advantage and block any cross examination as to his subsequent refusal to talk by later invoking the Fifth Amendment.

The district court properly tailored the Government's response to Kay's proposed use of the testimony by allowing the Government - if Kay testified as to his initial statements - to ask if Kay was summoned by the SEC and whether he responded but not about his refusal to respond to lawyers engaged by the company to conduct an internal investigation.

Thus, the court made a fair and proportional response in admitting and excluding some evidence. The court recognized here that Kay had a fundamental right to silence, yet he wished to invoke the positive inference of his disclosures by testifying about his

---

if defendant's use of the privilege is "in fact inconsistent" with his testimony).

[118] Kay Repl. Br. at 27.

disclosures and simultaneously avoid any mention of later silence that could damage this inference. Entirely preventing Government questioning related to Kay's disclosures *and* silence would have prevented the Government from sufficiently responding to Kay's testimony. We find no Fifth Amendment violation.

IX

Murphy contests the district court's decision to increase his sentence by two levels for an abuse of trust under § 3B1.3 of the Federal Sentencing Guidelines. Although post-*Booker*, the Sentencing Guidelines are only advisory,[119] we must still ensure that the district court properly applied the guidelines when enhancing a sentence under the guidelines range.[120] Under § 3B1.3, a defendant commits an abuse of trust by "abus[ing] a position of public or private trust, or us[ing] a special skill, in a manner that significantly facilitate[s] the commission or concealment of the offense . . . ."

We read the abuse of trust standard as a two-part test, asking "(1) whether the defendant occupies a position of trust and (2) whether the defendant abused her position in a manner that significantly facilitated the commission or concealment of the offense."[121] We

---

[119] *United States v. Booker*, 543 U.S. 220, 246 (2005).

[120] *See, e.g.*, *United States v. Villegas*, 404 F.3d 355, 362 (5th Cir. 2005) (per curiam).

[121] *United States v. Jobe*, 101 F.3d 1046, 1065 (5th Cir. 1996) (quoting *United States v. Fisher*, 7 F.3d 69, 70-71 (5th Cir. 1993)).

further define significant facilitation by determining "whether the defendant occupied a superior position, relative to all people in a position to commit the offense, as a result of her job."[122] Although in *Sudeen* we questioned the first prong and suggested that defendant need not "legitimately" occupy a position of trust,[123] we have not overruled this test and therefore apply it here. We review the court's legal interpretation of § 3B1.3 *de novo*, with deference to the district court.[124] We also review the question of whether Defendants occupied a position of trust *de novo*, while we review the abuse of trust for commission or concealment of an offense for clear error.[125]

In reviewing the court's enhancement, we first determine whether an abuse of trust or skill is part of the FCPA (the base offense) or a specific characteristic of the FCPA. If so, the guidelines would not provide for enhancement based on an abuse of trust, as use of the enhancement would lead to double counting.

The FCPA does not require an individual to possess special skills to be culpable under the Act. The Application Notes to § 3B1.3 define "special skill" as a "skill not possessed by members of the general public and usually requiring substantial education, training,

---

[122] *Id.*

[123] *United States v. Sudeen*, 434 F.3d 384, 391-92 (5th Cir. 2005).

[124] *Id.* at 391.

[125] *Id.* (citing *United States v. Hussey*, 254 F.3d 428, 431 (2d Cir. 2001)).

or licensing." The FCPA contains no such requirements; it applies to "any officer, director, employee, or agent" of an issuer or "any stockholder thereof acting on behalf of such issuer,"[126] whose actions fall under the remaining elements of the Act. Nor does the Act require a defendant to commit an abuse of trust.

Although we have not yet addressed an abuse of trust enhancement under the FCPA, we have found in fraud and embezzlement cases that the base offense does not include an abuse of trust but rather a lesser standard of breach of trust.[127] We have also upheld abuse of trust enhancements in money laundering cases, finding that the conduct that led to the conviction under the base offense did not "itself . . . include any abuse of trust."[128] Like fraud, embezzlement, and money laundering offenses, Murphy's actions that led to his FCPA conviction - falsely reporting import quantities and bribing foreign officials to accept false reports - were not themselves an abuse of trust as defined by § 3B1.3. Therefore, a

---

[126] 15 U.S.C. § 78dd-1(a).

[127] *See United States v. Buck*, 324 F.3d 786, 792-93 (5th Cir.2003) (discussing cases where the Fifth Circuit has affirmed abuse of trust enhancements in fraud sentences, and determining that "3B1.3 may apply to embezzlement convictions"). Under fraud and embezzlement, the court should distinguish "between the breach of trust necessary . . . and more egregious conduct and discretion necessary to trigger an abuse of trust enhancement." *Id.* at 793.

[128] *United States v. Powers*, 168 F.3d 741, 751 (5th Cir. 1999).

sentence enhancement under § 3B1.3 is not "double counting" in this context.

Under the two-prong test for abuse of trust under § 3B1.3, Murphy occupied a position of trust with respect to the Haitian government. Murphy errs in arguing that the abuse of trust enhancement only applies when a defendant abuses "a position of trust vis-à-vis the victim of the crime." As we noted in *Buck*: "We have never held . . . nor do the guidelines explicitly require, that the determination whether a defendant occupied a position of trust must be assessed from the perspective of the victim."[129] In that case, we upheld the defendant's sentence enhancement because she violated her position of trust with respect to the government.[130]

We have also applied § 3B1.3 enhancements where the defendant's position of trust did not apply to the main victims of the crime, but rather to collateral victims. In *Sidhu*, we affirmed a doctor's conviction for defrauding the government and insurance companies by mis-reporting patient services and over-billing patients. The doctor had a position of trust with respect to the patients, yet the lower court based his conviction on government and insurance company fraud.[131] We have interpreted *Sidhu* to permit enhancement under § 3B1.3 "whenever *any* victim of a

---

[129] *Buck*, 324 F.3d at 794.

[130] *Id.* at 795.

[131] *United States v. Sidhu*, 130 F.3d 644, 647, 655-56 (5th Cir. 1997).

criminal scheme placed the defendant in a position of trust that significantly facilitated the crime."[132] Here, Murphy, as the president and CEO of ARI, maintained a position of trust with respect to the Haitian government as well as ARI's shareholders. Even if the shareholders are not primary victims of the crime charged, Murphy harmed shareholders by conducting illegal foreign activities on behalf of the corporation.

Murphy, in occupying a position of trust, maintained a position superior to that of all other individuals with a similar ability to commit or conceal offenses. As a leader within the corporation, the record shows that Murphy authorized employees to pay "commissions" (bribes) to Haitian officials to induce these officials to accept underreported quantities of rice imports.[133] In doing so, Murphy "significantly facilitated the commission" of the FCPA offense. The district court therefore committed no error in applying the § 3B1.3 enhancement for abuse of a trust position to Murphy's sentence, and we AFFIRM the sentencing enhancement.

X

We AFFIRM conviction of Defendants on all counts.

---

[132] *Buck*, 324 F.3d at 795 (emphasis added).

[133] *See, e.g.*, Government Exhibit 82, E-mail from Douglas Murphy to ARI employees and David Kay (Dec. 29, 1998) (approving a $40,000 commissions payment to Haitian officials); Testimony of Lawrence Theriot (describing conversations with Kay and Murphy regarding ways to "shrink" the cargo and reduce tax payments under "Plan B").

APPENDIX B

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 02-20588

UNITED STATES OF AMERICA, Plaintiff-Appellant,
v.
DAVID KAY; DOUGLAS MURPHY, Defendants-Appellees

February 4, 2004

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

Before WIENER, BENAVIDES and DENNIS, Circuit Judges.

WIENER, Circuit Judge:

Plaintiff-appellant, the United States of America ("government") appeals the district court's grant of the motion of defendants-appellees David Kay and Douglas Murphy ("defendants") to dismiss the Superseding Indictment[1] ("indictment") that charged them with bribery of foreign officials in violation of the

---

[1] A copy of the Superseding Indictment is appended hereto in its entirety and identified as Appendix A.

Foreign Corrupt Practices Act ("FCPA").[2] In their dismissal motion, defendants contended that the indictment failed to state an offense against them. The principal dispute in this case is whether, if proved beyond a reasonable doubt, the conduct that the indictment ascribed to defendants in connection with the alleged bribery of Haitian officials to understate customs duties and sales taxes on rice shipped to Haiti to assist American Rice, Inc. in obtaining or retaining business was sufficient to constitute an offense under the FCPA. Underlying this question of sufficiency of the contents of the indictment is the preliminary task of ascertaining the scope of the FCPA, which in turn requires us to construe the statute.

The district court concluded that, as a matter of law, an indictment alleging illicit payments to foreign officials for the purpose of avoiding substantial portions of customs duties and sales taxes to obtain or retain business are not the kind of bribes that the FCPA criminalizes. We disagree with this assessment of the scope of the FCPA and hold that such bribes *could* (but do not necessarily) come within the ambit of the statute. Concluding in the end that the indictment in this case is sufficient to state an offense under the FCPA, we remand the instant case for further proceedings consistent with this opinion. Nevertheless, on remand the defendants may choose to submit a motion asking the district court to compel the government to allege more specific facts regarding the intent element of an FCPA crime that requires the defendant to intend for the foreign official's anticipated conduct in consideration of a bribe

---

[2] 15 U.S.C. § 78dd-1 *et seq.* (2000).

(hereafter, the "*quid pro quo*") to produce an anticipated result—here, diminution of duties and taxes—that would *assist* (or is meant to *assist*) in *obtaining* or *retaining* business (hereafter, the "business nexus element"). If so, the trial court will need to decide whether (1) merely quoting or paraphrasing the statute as to that element (as was done here) is sufficient, or (2) the government must allege additional facts as to just *what* business was sought to be obtained or retained in Haiti and just *how* the intended *quid pro quo* was meant to assist in obtaining or retaining such business. We therefore reverse the district court's dismissal of the indictment and remand for further consistent proceedings.

I. FACTS AND PROCEEDINGS

American Rice, Inc. ("ARI") is a Houston-based company that exports rice to foreign countries, including Haiti. Rice Corporation of Haiti ("RCH"), a wholly owned subsidiary of ARI, was incorporated in Haiti to represent ARI's interests and deal with third parties there. As an aspect of Haiti's standard importation procedure, its customs officials assess duties based on the quantity and value of rice imported into the country. Haiti also requires businesses that deliver rice there to remit an advance deposit against Haitian sales taxes, based on the value of that rice, for which deposit a credit is eventually allowed on Haitian sales tax returns when filed.

In 2001, a grand jury charged Kay with violating the FCPA and subsequently returned the indictment, which charges both Kay and Murphy with 12 counts of

FCPA violations. As is readily apparent on its face, the indictment contains detailed factual allegations about (1) the timing and purposes of Congress's enactment of the FCPA, (2) ARI and its status as an "issuer" under the FCPA, (3) RCH and its status as a wholly owned subsidiary and "service corporation" of ARI, representing ARI's interest in Haiti, and (4) defendants' citizenship, their positions as officers of ARI, and their status as "issuers" and "domestic concerns" under the FCPA. The indictment also spells out in detail how Kay and Murphy allegedly orchestrated the bribing of Haitian customs officials to accept false bills of lading and other documentation that intentionally understated by one-third the quantity of rice shipped to Haiti, thereby significantly reducing ARI's customs duties and sales taxes. In this regard, the indictment alleges the details of the bribery scheme's machinations, including the preparation of duplicate documentation, the calculation of bribes as a percentage of the value of the rice not reported, the surreptitious payment of monthly retainers to Haitian officials, and the defendants' purported authorization of withdrawals of funds from ARI's bank accounts with which to pay the Haitian officials, either directly or through intermediaries—all to produce substantially reduced Haitian customs and tax costs to ARI. Further, the indictment alleges discrete facts regarding ARI's domestic incorporation and place of business, as well as the particular instrumentalities of interstate and foreign commerce that defendants used or caused to be used in carrying out the purported bribery.

In contrast, without any factual allegations, the indictment merely paraphrases the one element of the

statute that is central to this appeal, only conclusionally accusing defendants of causing payments to be made to Haitian customs officials:

> for purposes of influencing acts and decisions of such foreign officials in their official capacities, inducing such foreign officials to do and omit to do acts in violation of their lawful duty, and to obtain an improper advantage, in order to *assist* American Rice, Inc. in *obtaining and retaining business* for, and directing business to American Rice, Inc. and Rice Corporation of Haiti. (Emphasis added).

Although it recites in great detail the discrete facts that the government intends to prove to satisfy each other element of an FCPA violation, the indictment recites no particularized facts that, if proved, would satisfy the "assist" aspect of the business nexus element of the statute, i.e., the nexus between the illicit tax savings produced by the bribery and the assistance such savings provided or were intended to provide in *obtaining or retaining business* for ARI and RCH. Neither does the indictment contain any factual allegations whatsoever to identify just *what* business in Haiti (presumably some rice-related commercial activity) the illicit customs and tax savings assisted (or were intended to assist) in obtaining or retaining, or just *how* these savings were supposed to assist in such efforts. In other words, the indictment recites no facts that could demonstrate an actual or intended cause-and-effect nexus between reduced taxes and obtaining identified business or retaining identified business opportunities.

In granting defendants' motion to dismiss the indictment for failure to state an offense, the district court held that, as a matter of law, bribes paid to obtain favorable tax treatment are not payments made to "obtain or retain business" within the intendment of the FCPA, and thus are not within the scope of that statute's proscription of foreign bribery.[3] The government timely filed a notice of appeal.

II. ANALYSIS

A. *Standard of Review*

We review *de novo* questions of statutory interpretation, as well as "whether an indictment sufficiently alleges the elements of an offense."[4] As a motion to dismiss an indictment for failure to state an offense is a challenge to the sufficiency of the indictment, we are required to "take the allegations of the indictment as true and to determine whether an offense has been stated."[5]

"[I]t is well settled that an indictment must set forth the offense with sufficient clarity and certainty to apprise the accused of the crime with which he is charged."[6] The test for sufficiency is "not whether the

---

[3] *United States v. Kay*, 200 F.Supp.2d 681, 686 (S.D.Tex.2002).

[4] *United States v. Santos-Riviera*, 183 F.3d 367, 369 (5th Cir.1999).

[5] *United States v. Hogue*, 132 F.3d 1087, 1089 (5th Cir.1998).

[6] *United States v. Bearden*, 423 F.2d 805, 810 (5th Cir.1970) (citations omitted).

indictment could have been framed in a more satisfactory manner, but whether it conforms to minimum constitutional standards"; namely, that it "[(1)] contain [ ] the elements of the offense charged and fairly inform[ ] a defendant of the charge against which he must defend, and [(2)], enable[ ] him to plead an acquittal or conviction in bar of future prosecutions for the same offense."[7]

Because an offense under the FCPA requires that the alleged bribery be committed for the purpose of inducing foreign officials to commit unlawful acts, the results of which will assist in obtaining or retaining business in their country, the questions before us in this appeal are (1) whether bribes to obtain illegal but favorable tax and customs treatment can ever come within the scope of the statute, and (2) if so, whether, in combination, there are minimally sufficient facts alleged in the indictment to inform the defendants regarding the nexus between, on the one hand, Haitian taxes avoided through bribery, and, on the other hand, assistance in getting or keeping some business or business opportunity in Haiti.

B. *Words of the FCPA*

"[T]he starting point for interpreting a statute is the language of the statute itself."[8] When construing a criminal statute, we "must follow the plain and

---

[7] *United States v. Ramirez*, 233 F.3d 318, 323 (5th Cir.2000).

[8] *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

unambiguous meaning of the statutory language."[9] Terms not defined in the statute are interpreted according to their "ordinary and natural meaning ... as well as the overall policies and objectives of the statute."[10] Furthermore, "a statute must, if possible, be construed in such fashion that every word has some operative effect."[11] Finally, we have found it "appropriate to consider the title of a statute in resolving putative ambiguities."[12] If, after application of these principles of statutory construction, we conclude that the statute is ambiguous, we may turn to legislative history. For the language to be considered ambiguous, however, it must be "susceptible to more than one reasonable interpretation"[13] or "more than one accepted meaning."[14]

The FCPA prohibits payments to foreign officials for purposes of:

---

[9] *Salinas v. United States*, 522 U.S. 52, 57 (1997) (citations and quotation marks omitted).

[10] *United States v. Lowe*, 118 F.3d 399, 402 (5th Cir.1997) (citations omitted).

[11] *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) (recognizing this principle as a "settled rule"); *United States v. Naranjo*, 259 F.3d 379, 383 (5th Cir.2001) (*citing Nordic Village, Inc.*).

[12] *United States v. Marek*, 238 F.3d 310, 321 (5th Cir.2001).

[13] *Lowe*, 118 F.3d at 402.

[14] *United Serv. Auto. Ass'n v. Perry*, 102 F.3d 144, 146 (5th Cir.1996).

> (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage ... in order to assist [the company making the payment] in obtaining or retaining business for or with, or directing business to, any person.[15]

None contend that the FCPA criminalizes every payment to a foreign official: It criminalizes only those payments that are intended to (1) influence a foreign official to act or make a decision in his official capacity, or (2) induce such an official to perform or refrain from performing some act in violation of his duty, or (3) secure some wrongful advantage to the payor. And even then, the FCPA criminalizes these kinds of payments only if the result they are intended to produce—their *quid pro quo*—will *assist* (or is intended to assist) the payor in efforts to get or keep some *business* for or with "any person." Thus, the first question of statutory interpretation presented in this appeal is whether payments made to foreign officials to obtain unlawfully reduced customs duties or sales tax liabilities can ever fall within the scope of the FCPA, i.e., whether the illicit payments made to obtain a reduction of revenue liabilities can *ever* constitute the kind of bribery that is proscribed by the FCPA. The district court answered this question in the negative; only if we answer it in the affirmative will we need to analyze the sufficiency of the factual allegations of the indictment as to the one element of the crime contested here.

---

[15] 15 U.S.C. § 78dd-1(a)(1).

The principal thrust of the defendants' argument is that the business nexus element, i.e., the "assist ... in obtaining or retaining business" element, narrowly limits the statute's applicability to those payments that are intended to obtain a foreign official's approval of a bid for a new government contract or the renewal of an existing government contract. In contrast, the government insists that, in addition to payments to officials that lead directly to getting or renewing business contracts, the statute covers payments that indirectly advance ("assist") the payor's goal of obtaining or retaining foreign business with or for some person. The government reasons that paying reduced customs duties and sales taxes on imports, as is purported to have occurred in this case, is the type of "improper advantage" that *always* will assist in obtaining or retaining business in a foreign country, and thus is always covered by the FCPA.

In approaching this issue, the district court concluded that the FCPA's language is ambiguous, and proceeded to review the statute's legislative history.[16] We agree with the court's finding of ambiguity for several reasons. Perhaps our most significant statutory construction problem results from the failure of the language of the FCPA to give a clear indication of the exact scope of the business nexus element; that is, the proximity of the required nexus between, on the one hand, the anticipated results of the foreign

---

[16] *Kay*, 200 F.Supp.2d at 683. Neither the district court nor this court concludes that the ambiguity in the FCPA even closely approaches the level of *vagueness*, in the constitutional criminal sense, that could lead to declaring the statute void for vagueness.

official's bargained-for action or inaction, and, on the other hand, the assistance provided by or expected from those results in helping the briber to obtain or retain business. Stated differently, how attenuated can the linkage be between the effects of that which is sought from the foreign official in consideration of a bribe (here, tax minimization) and the briber's goal of finding assistance or obtaining or retaining foreign business with or for some person, and still satisfy the business nexus element of the FCPA?

Second, the parties' diametrically opposed but reasonable contentions demonstrate that the ordinary and natural meaning of the statutory language *is* genuinely debatable and thus ambiguous. For instance, the word "business" can be defined at any point along a continuum from "a volume of trade," to "the purchase and sale of goods in an attempt to make a profit," to "an assignment" or a "project."[17] Thus, dictionary definitions can support both (1) the government's broader interpretation of the business nexus language as encompassing any type of commercial activity, and (2) defendants' argument that "obtain or retain business" connotes a more pedestrian understanding of establishing or renewing a particular commercial arrangement. Similarly, although the word "assist" suggests a somewhat broader statutory scope,[18] it does not connote specificity or define either

---

[17] *Webster's Encyclopedic Unabridged Dictionary*, at 201 (1989).

[18] Invoking basic economic principles, the SEC reasoned in its amicus brief that securing reduced taxes and duties on imports through bribery enables ARI to reduce its cost of doing business, thereby giving it an "improper advantage" over actual or potential

how proximate or how remote the foreign official's anticipated actions that constitute assistance must or may be to the business obtained or retained.

Third, absent a firm understanding of just what "obtaining or retaining business" or "assist" actually include, the parties' remaining arguments prove little. For instance, the separation of the statutory prohibition into two aspects–(1) seeking to induce a foreign official to act in consideration of a bribe (*quid pro quo*) (2) for purposes of assisting in obtaining or retaining business (business nexus)—provides little insight into the precise scope of the statute. The government may be correct in its contention that the *quid pro quo* requirement expands the scope of the statute, because Congress otherwise could have dispensed with the *quid pro quo* requirement entirely and simply prohibited only those payments resulting directly in obtaining or retaining business contracts. It is at least plausible, however, as defendants argue, that the *quid pro quo* requirement was not necessarily meant to expand the statutory scope, but instead was meant to distinguish acts of a foreign official in his official capacity from acts in his private capacity. Similarly, defendants might be right in urging that the business nexus element restricts the scope of the statute to a smaller universe of payments than those made to obtain *any* advantage; yet it is conceivable that this restriction was included to exempt more marginal facilitating payments, but not the types of payments that defendants are accused of making.

---

competitors, and enabling it to do more business, or remain in a market it might otherwise leave.

Neither does the remainder of the statutory language clearly express an exclusively broad or exclusively narrow understanding of the business nexus element. The extent to which the exception for routine governmental action ("facilitating payments" or "grease") is narrowly drawn reasonably suggests that Congress was carving out very limited categories of permissible payments from an otherwise broad statutory prohibition.[19] As defendants suggest, however, another plausible implication for including an express statutory explanation that routine governmental action does not include decisions "to award new business to or to continue business with a particular party,"[20] is that Congress was focusing

---

[19] Section 78dd-1(b) excepts from the statutory scope "any facilitating or expediting payment to a foreign official ... the purpose of which is to expedite or to service the performance of a routine governmental action by a foreign official...." 15 U.S.C. § 78dd-1(b). Section 78dd-1(f)(3)(A), in turn, provides that:

[T]he term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in—

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature. 15 U.S.C. § 78dd-1(f)(3)(A).

[20] 15 U.S.C. § 78dd-1(f)(3)(B).

entirely on identifiable decisions made by foreign officials in granting or renewing specific business arrangements in foreign countries, and not on a more general panoply of competitive business advantages.

The fourth and final interpretive factor, the statute's title—"Foreign Corrupt Practices Act"—is more suggestive of a relatively broad application of its provisions, but only slightly so. By itself, such a generic title fails to make one interpretation of the statutory language more persuasive than another, much less establish one as the only reasonable construction of the statute.[21] In sum, neither the ordinary meaning nor the provisions surrounding the disputed text are sufficiently clear to make the statutory language susceptible of but one reasonable interpretation. Inasmuch as Congress chose to phrase the business nexus requirement obliquely, and to say nothing to suggest how remote or how proximate the business nexus must be, we cannot conclude on the

---

[21] Defendants also contend that the few reported decisions under the FCPA lend additional support to their narrow reading of the statutory language, because each of these cases involved payments linked to the acquisition or renewal of contracts or commercial agreements. *See, e.g., United States v. Liebo*, 923 F.2d 1308, 1311-12 (8th Cir.1991) (defendant paid gifts to foreign official in exchange for contract approval); *United States v. Castle*, 925 F.2d 831, 832 (5th Cir.1991) (defendants made a payment to win bid to provide buses to Canadian provincial government). According to defendant, these cases did not involve payments made to influence some aspect of existing business, i.e., some particular cost of doing business. Defendants nevertheless concede, and the government reiterates, that none of these decisions squarely addresses the scope of the "obtain and retain business" language.

basis of the provision itself that the statute is either as narrow or as expansive as the parties respectively claim.

C. *FCPA Legislative History*

As the statutory language itself is amenable to more than one reasonable interpretation, it is ambiguous as a matter of law. We turn therefore to legislative history in our effort to ascertain Congress's true intentions.

1. *1977 Legislative History*

Congress enacted the FCPA in 1977, in response to recently discovered but widespread bribery of foreign officials by United States business interests. Congress resolved to interdict such bribery, not just because it is morally and economically suspect, but also because it was causing foreign policy problems for the United States.[22] In particular, these concerns arose from revelations that United States defense contractors and oil companies had made large payments to high government officials in Japan, the Netherlands, and

---

[22] The House Committee stated that such bribes were "counter to the moral expectations and values of the American public," "erode[d] public confidence in the integrity of the free market system," "embarrass[ed] friendly governments, lower[ed] the esteem for the United States among the citizens of foreign nations, and lend[ed] credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations." H.R.Rep. No. 95-640, at 4-5 (1977); S.Rep. No. 95-114, at 3-4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4100-01.

Italy.[23] Congress also discovered that more than 400 corporations had made questionable or illegal payments in excess of $300 million to foreign officials for a wide range of favorable actions on behalf of the companies.[24]

In deciding to criminalize this type of commercial bribery, the House and Senate each proposed similarly far-reaching, but non-identical, legislation. In its bill, the House intended "broadly [to] prohibit[ ] transactions that are *corruptly* intended to induce the recipient to use his or her influence to affect *any* act or decision of a foreign official...."[25] Thus, the House bill contained no limiting "business nexus" element.[26] Reflecting a somewhat narrower purpose, the Senate expressed its desire to ban payments made for the purpose of inducing foreign officials to act "so as to direct business to any person, maintain an established business opportunity with any person, divert any business opportunity from any person or influence the enactment or promulgation of legislation or regulations of that government or instrumentality."[27]

---

[23] H.R.Rep. No. 95-640, at 5; S.Rep. No. 95-114, at 3.

[24] H.R.Rep. No. 95-640, at 4; S.Rep. No. 95-114, at 3.

[25] H.R.Rep. No. 95-640, at 7 (emphasis added).

[26] H.R. Conf. Rep. No. 95-831, at 12 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4120, 4124-25.

[27] S.Rep. No. 95-114, at 17; S. 305, 95th Cong. § 103 (proposing to ban payments that induce action by a foreign official so as "to assist ... in obtaining or retaining business for or with, or directing business to, any person, or influencing legislation or regulations of that government or instrumentality").

At conference, compromise language "clarified the scope of the prohibition by requiring that the purpose of the payment must be to influence any act or decision of a foreign official ... so as to assist an issuer in obtaining, retaining or directing business to any person."[28] In the end, then, Congress adopted the Senate's proposal to prohibit only those payments designed to induce a foreign official to act in a way that is intended to facilitate ("assist") in obtaining or retaining of business.

Congress expressly emphasized that it did not intend to prohibit "so-called grease or facilitating payments,"[29] such as "payments for expediting shipments through customs or placing a transatlantic telephone call, securing required permits, or obtaining adequate police protection, transactions which may involve even the proper performance of duties."[30] Instead of making an express textual exception for these types of non-covered payments, the respective committees of the two chambers sought to distinguish permissible grease payments from prohibited bribery by only prohibiting payments that induce an official to act "corruptly," i.e., actions requiring him "to misuse his official position" and his discretionary authority,[31]

---

[28] H.R. Conf. Rep. 95-831, at 12.

[29] H.R.Rep. No. 95-640, at 4; S.Rep. No. 95-114, at 10.

[30] S.Rep. No. 95-114, at 10.

[31] H.R.Rep. No. 95-640, at 7-8; S.Rep. No. 95-114, at 10.

not those "essentially ministerial" actions that "merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action."[32]

In short, Congress sought to prohibit the type of bribery that (1) prompts officials to misuse their discretionary authority and (2) disrupts market efficiency and United States foreign relations,[33] at the same time recognizing that smaller payments intended to expedite ministerial actions should remain outside of the scope of the statute. The Conference Report explanation, on which the district court relied to find a narrow statutory scope, truly offers little insight into the FCPA's precise scope, however; it merely parrots the statutory language itself by stating that the purpose of a payment must be to induce official action "so as to assist an issuer in obtaining, retaining or directing business to any person."[34]

To divine the categories of bribery Congress did and did not intend to prohibit, we must look to the Senate's proposal, because the final statutory language

---

[32] H.R.Rep. No. 95-640, at 8. Similarly, when the House defined "foreign official" it excluded those individuals "whose duties are essentially ministerial or clerical." *Id.*

[33] *See Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1029 (6th Cir.1990) (finding that "the FCPA was primarily designed to protect the integrity of American foreign policy and domestic markets").

[34] H.R. Conf. Rep. 95-831, at 12.

was drawn from it,[35] and from the SEC Report on which the Senate's legislative proposal was based.[36] In distinguishing among the types of illegal payments that United States entities were making at the time, the SEC Report identified four principal categories: (1) payments "made in an effort to procure special and unjustified favors or advantages in the enactment or *administration of the tax or* other laws" of a foreign country; (2) payments "made with the intent to assist the company in obtaining or retaining government contracts"; (3) payments "to persuade low-level government officials to perform functions or services which they are obliged to perform as part of their governmental responsibilities, but which they may refuse or delay unless compensated" ("grease"), and (4) political contributions.[37] The SEC thus exhibited concern about a wide range of questionable payments (explicitly including the kind at issue here) that were resulting in millions of dollars being recorded falsely in corporate books and records.[38]

---

[35] As the House intended its proposed legislation to apply even more broadly to payments soliciting *any* corrupt act by a foreign official, we assume that any restrictions of scope emanated from the Senate version.

[36] Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices, submitted to the Senate Banking, Housing and Urban Affairs Committee, May 12, 1976 [hereinafter, "SEC Report"]. The Senate Report explained that its bill was identical to the bill introduced the year before, which in turn, was based substantially on the SEC Report and its recommendations. S.Rep. No. 95-114, at 2.

[37] SEC Report, at 25-27 (emphasis added).

[38] *Id.* at a (Introduction), 25-27.

As noted, the Senate Report explained that the statute should apply to payments intended "to *direct business* to any person, *maintain an established business opportunity* with any person, divert any business opportunity from any person or *influence the enactment or promulgation of legislation or regulations* of that government or instrumentality."[39] We observe initially that the Senate only loosely addressed the categories of conduct highlighted by the SEC Report. Although the Senate's proposal picked up the SEC's concern with a business nexus, it did not expressly cover bribery influencing the administration of tax laws or seeking favorable tax treatment. It is clear, however, that even though the Senate was particularly concerned with bribery intended to secure new business, it was also mindful of bribes that influence legislative or regulatory actions, and those that maintain established business opportunities, a category of economic activity separate from, and much more capacious than, simply "directing business" to someone.

The statute's ultimate language of "obtaining or retaining" mirrors identical language in the SEC Report. But, whereas the SEC Report highlights payments that go toward "obtaining or retaining *government contracts*," the FCPA, incorporating the Senate Report's language, prohibits payments that assist in obtaining or retaining *business*, not just government contracts. Had the Senate and ultimately Congress wanted to carry over the exact, narrower

---

[39] S.Rep. No. 95-114, at 17 (emphasis added).

scope of the SEC Report, they would have adopted the same language. We surmise that, in using the word "business" when it easily could have used the phraseology of SEC Report, Congress intended for the statute to apply to bribes beyond the narrow band of payments sufficient only to "obtain or retain government contracts." The Senate's express intention that the statute apply to corrupt payments that *maintain* business opportunities also supports this conclusion.

For purposes of deciding the instant appeal, the question nevertheless remains whether the Senate, and concomitantly Congress, intended this broader statutory scope to encompass the administration of tax, customs, and other laws and regulations affecting the revenue of foreign states. To reach this conclusion, we must ask whether Congress's remaining expressed desire to prohibit bribery aimed at getting assistance in retaining business or maintaining business opportunities was sufficiently broad to include bribes meant to affect the administration of revenue laws. When we do so, we conclude that the legislative intent was so broad.

Congress was obviously distraught not only about high profile bribes to high-ranking foreign officials, but also by the pervasiveness of foreign bribery by United States businesses and businessmen. Congress thus made the decision to clamp down on bribes intended to prompt foreign officials to misuse their discretionary authority for the benefit of a domestic entity's business in that country. This observation is not diminished by Congress's understanding and accepting that relatively small facilitating payments were, at the

time, among the accepted costs of doing business in many foreign countries.[40]

In addition, the concern of Congress with the immorality, inefficiency, and unethical character of bribery presumably does not vanish simply because the tainted payments are intended to secure a favorable decision less significant than winning a contract bid. Obviously, a commercial concern that bribes a foreign government official to award a construction, supply, or services contract violates the statute. Yet, there is little difference between this example and that of a corporation's lawfully obtaining a contract from an honest official or agency by submitting the lowest bid, and—either before or after doing so—bribing a different government official to reduce taxes and thereby ensure that the under-bid venture is nevertheless profitable. Avoiding or lowering taxes reduces operating costs and thus increases profit margins, thereby freeing up funds that the business is otherwise legally obligated to expend. And this, in turn, enables it to take any number of actions to the disadvantage of competitors. Bribing foreign officials to lower taxes and customs duties certainly *can* provide an unfair advantage over

---

[40] We recognize that all payments to foreign officials exist on a continuum in which any payment, even if only to connect telephone service in two days instead of two weeks, marginally improves a company's competitive advantage in a foreign country. Nevertheless, Congress was principally concerned about payments that prompt an official to deviate from his official duty, not necessarily payments that get an official to perform properly those usually ministerial duties required of his office. As explained *infra*, Congress enacted amendments in 1988 in an effort to reflect just how limited it envisioned the grease exception to be.

competitors and thereby be of assistance to the payor in obtaining or retaining business. This demonstrates that the question whether the defendants' alleged payments constitute a violation of the FCPA truly turns on whether these bribes were intended to lower ARI's cost of doing business in Haiti enough to have a sufficient nexus to garnering business there or to maintaining or increasing business operations that ARI already had there, so as to come within the scope of the business nexus element as Congress used it in the FCPA. Answering this fact question, then, implicates a matter of proof and thus evidence.

In short, the 1977 legislative history, particularly the Senate's proposal and the SEC Report on which it relied, convinces us that Congress meant to prohibit a range of payments wider than only those that directly influence the acquisition or retention of government contracts or similar commercial or industrial arrangements. On the other end of the spectrum, this history also demonstrates that Congress explicitly excluded facilitating payments (the grease exception). In thus limiting the exceptions to the type of bribery covered by the FCPA to this narrow category, Congress's intention to cast an otherwise wide net over foreign bribery suggests that Congress intended for the FCPA to prohibit all other illicit payments that are intended to influence non-trivial official foreign action in an effort to aid in obtaining or retaining business for some person. The congressional target was bribery paid to engender assistance in improving the business opportunities of the payor or his beneficiary, irrespective of whether that assistance be direct or indirect, and irrespective of whether it be related to administering the law, awarding, extending, or

renewing a contract, or executing or preserving an agreement. In light of our reading of the 1977 legislative history, the subsequent 1988 and 1998 legislative history is only important to our analysis to the extent it confirms or conflicts with our initial conclusions about the scope of the statute.

2. *1988 Legislative History*

After the FCPA's enactment, United States business entities and executives experienced difficulty in discerning a clear line between prohibited bribes and permissible facilitating payments.[41] As a result, Congress amended the FCPA in 1988, expressly to clarify its original intent in enacting the statute. Both houses insisted that their proposed amendments only clarified ambiguities "without changing the basic intent or effectiveness of the law."[42]

In this effort to crystallize the scope of the FCPA's prohibitions on bribery, Congress chose to identify carefully two types of payments that are not proscribed by the statute. It expressly excepted payments made to procure "routine governmental

---

[41] S.Rep. No. 100-85, at 53 (1987) (stating that "the method chosen by Congress in 1977 to accomplish [the task of distinguishing grease payments from bribery] has been difficult to apply in practice").

[42] *Id.* at 54; H.R.Rep. No. 100-40, pt. 2, at 77 (1987) (stating that the amendments, particularly the exception for facilitating payments, "will reflect current law and Congressional intent more clearly").

action" (again, the grease exception),[43] and it incorporated an affirmative defense for payments that are legal in the country in which they are offered or that constitute bona fide expenditures directly relating to promotion of products or services, or to the execution or performance of a contract with a foreign government or agency.[44]

We agree with the position of the government that these 1988 amendments illustrate an intention by Congress to identify very limited exceptions to the kinds of bribes to which the FCPA does not apply. A brief review of the types of routine governmental actions enumerated by Congress shows how limited Congress wanted to make the grease exceptions. Routine governmental action, for instance, includes "obtaining permits, licenses, or other official

---

[43] 15 U.S.C. §§ 78dd-1(b) & (f)(3)(A). *See supra* note 19 for language of these subsections.

[44] 15 U.S.C. § 78dd-1(c). The subsection provides in full:
It shall be an affirmative defense to actions under subsections (a) or (g) of this section that—

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to—

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof. *Id.*

documents to qualify a person to do business in a foreign country," and "scheduling inspections associated with contract performance or inspections related to transit of goods across country."[45] Therefore, routine governmental action does not include the issuance of *every* official document or *every* inspection, but only (1) documentation that qualifies a party to do business and (2) scheduling an inspection—very narrow categories of largely non-discretionary, ministerial activities performed by mid- or low-level foreign functionaries. In contrast, the FCPA uses broad, general language in prohibiting payments to procure assistance for the payor in obtaining or retaining business, instead of employing similarly detailed language, such as applying the statute only to payments that attempt to secure or renew particular government contracts. Indeed, Congress had the opportunity to adopt narrower language in 1977 from the SEC Report, but chose not to do so.[46]

---

[45] 15 U.S.C. § 78dd-1(f)(3)(A).

[46] Defendants argue that Congress intended to maintain the statute's narrow scope by excluding from the routine governmental action exception "any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party...." 15 U.S.C. § 78dd-1(f)(3)(B). We disagree with defendants' contention that the language these amendments indicates a narrow statutory scope. Read in light of Congress's original desire to stamp out foreign bribery run amok, we find that its intention in 1988 to exclude from the grease exception "decision[s] by a foreign official whether, or on what terms ... to continue business with a particular party" replicates the equally capacious language of prohibition in the 1977 legislative history.

Defendants argue, nevertheless, that Congress's decision to reject House-proposed amendments to the business nexus element constituted its implicit rejection of such a broad reading of the statute. The House bill proposed new language to explain that payments for "obtaining or retaining business" also includes payments made for the "procurement of legislative, judicial, regulatory, or other action in seeking more favorable treatment by a foreign government."[47] Indeed, defendants assert, the proposed amendment itself shows that Congress understood the business nexus provision to have narrow application; otherwise, there would have been no need to propose amending it.

Contrary to defendants' contention, the decision of Congress to reject this language has no bearing on whether "obtaining or retaining business" includes the conduct at issue here. In explaining Congress's decision not to include this proposed amendment in the business nexus requirement, the Conference Report stated that the "retaining business" language was

> not limited to the renewal of contracts or other business, but also includes a prohibition against corrupt payments related to the execution or performance of contracts or the carrying out of existing business, *such as a payment to a foreign official for the purpose of obtaining more favorable tax treatment*. . . . The term should not, however, be construed so broadly as to include lobbying or

---

[47] H.R. Conf. Rep. 100-576, at 918 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1951.

> other normal representations to government officials.[48]

At first blush, this statement would seem to resolve the instant dispute in favor of the government; however, the district court interpreted Congress's decision to leave the business nexus requirement unchanged as a determination not to extend the scope of the statute. The court thus declined to defer to the report because, in the court's estimation, the legislative history "consist[ed] of an after-the-fact interpretation of the term 'retaining business' by a subsequent Congress more than ten years after the enactment of the original language."[49]

We agree that, as a general matter, subsequent legislative history about unchanged statutory language would deserve little or no weight in our analysis. The Supreme Court has instructed that "the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute."[50] In this case, moreover, Congress's enactment of subsequent legislation did not include changes to the business nexus requirement itself.

Nevertheless, the Supreme Court has also stated that "[s]ubsequent legislation declaring the intent of

---

[48] H.R. Conf. Rep. No. 100-576, at 918-19 (emphasis added).

[49] *Kay*, 200 F.Supp.2d at 685.

[50] *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 185 (1994) (citations omitted).

an earlier statute is entitled to great weight in statutory construction."[51] And, we have concluded that Congress is "at its most authoritative [when] adding complex and sophisticated amendments to an already complex and sophisticated act."[52] Although in 1988 Congress refused to alter the business nexus requirement itself, it did enact exceptions and defenses to the statute's applicability, both of which the pertinent Conference Report language helps to explain vis-à-vis the statute's overall scope. And it must be remembered that clarifying the scope of the 1977 law was the overarching purpose of Congress in enacting the 1988 amendments.[53] Thus, the legislative history that the district court rejected as irrelevant in fact explains how the 1988 amendments relate to the original scope of the statute and concomitantly to the business nexus element.

First, the Conference Report expresses what is implied by the new affirmative defense for bona fide expenditures for the execution or performance of a contract. The creation of a defense for *bona fide*

---

[51] *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-81 (1969).

[52] *Mount Sinai Hosp. v. Weinberger*, 517 F.2d 329, 343 (5th Cir.1975).

[53] We recognize that the Supreme Court has warned repeatedly that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Consumer Prod. Safety Comm'n*, 447 U.S. at 117 (citations omitted). The amendments Congress passed in 1988, however, expressly sought to clarify Congress's intent from 1977. Thus, the views and amendments of Congress in 1988 are necessary to our analysis of the precise scope of the original law.

payments strongly implies that *corrupt*, non-bona-fide payments related to contract execution and performance have always been and remain prohibited. Instead of leaving this prohibition implicit, though, the Conference Report's description of "retaining business" explained that this phrase, and thus the statutory ambit, includes "a prohibition against *corrupt* payments related to the execution or performance of contracts...."[54]

Similarly, in its 1988 statutory description of routine governmental action, Congress stated that this exception *does not* include decisions about "whether, or on what terms ... to continue business with a particular party,"[55] which must mean, conversely, that decisions that do relate to "continu[ing] business with a particular party" *are* covered by, i.e., are not excepted from, the scope of the statute. The Conference Report, in turn, states that "retaining business" means "the carrying out of existing business," thereby simply repeating statutory intent without explaining it.[56] We discern no meaningful distinction between the phrase "continuing business" in the statutory text, and "carrying out of existing business" in the Conference Report.

Third, the Conference Report states that "retaining business" should not be construed so broadly as to include lobbying or "other normal

---

[54] H.R. Conf. Rep. 100-576, at 918 (emphasis added).

[55] 15 U.S.C. § 78dd-1(f)(3)(B).

[56] H.R. Conf. Rep. No. 100-576, at 918.

representations to government officials."[57] This statement directly reflects the Conference Committee's decision not to include language from the House bill focusing on legislature and regulatory activity so as to avoid any interpretation that might curb legitimate lobbying or representations intended to influence legislative, judicial, regulatory, or other such action. Thus, like other language of the report, far from being irrelevant to Congress's intentions in 1988, this provides a direct explanation of why Congress elected not to include the newly proposed language.

The remaining contested language in the 1988 Conference Report states that "retaining business" includes—covers—payments such as those made "to a foreign official *for the purpose of obtaining more favorable tax treatment.*"[58] We know that the SEC was concerned specifically with these types of untoward payments in 1977, and that Congress ultimately adopted the more generally-worded prohibition against payments designed to *assist* in obtaining or retaining business. This specific reference in the Conference Report therefore appears to reflect the concerns that initially motivated Congress to enact the FCPA. But even if this language is not dispositive of the question, the rest of the passage does reflect Congress's purpose in passing the 1988 amendments, and therefore deserves weight in our analysis.

Finally, it is inaccurate to suggest, as defendants do, that this report language constituted an attempt to

---

[57] *Id.* at 918-19.

[58] *Id.* at 918 (emphasis added).

insert by subterfuge a meaning for "retaining business" that Congress had expressly rejected in conference. The only language that Congress chose not to adopt regarding the business nexus requirement concerned payments for primarily legislative, judicial, and regulatory advantages.[59] Corrupt payments "related to the execution or performance of contracts or the carrying out of existing business" have no direct connection with the proposed language on legislative, judicial, and regulatory action, and thus were not part of the proposed amendment.[60]

3. *1998 Legislative History*

In 1998, Congress made its most recent adjustments to the FCPA when the Senate ratified and Congress implemented the Organization of Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "Convention"). Article 1.1 of the Convention prohibits payments to a foreign public official to induce him to "act or refrain from acting in relation to the

---

[59] We recognize that the House proposal prohibited payments for "procurement of legislative, judicial, regulatory, or *other* action in seeking more favorable treatment by a foreign government." H.R.Rep. No. 100-40, pt. 2, at 75. Applying the *ejusden generis* maxim, we must conclude that by using a term as vague as "other action" directly after the words "legislative, judicial, or regulatory," Congress intended to include only actions quite similar to these types in its amendment, not any other conceivable action (aside from discrete contractual arrangements) that might result in favorable treatment from a foreign government.

[60] H.R. Conf. Rep. No. 100-576, at 918.

performance of official duties, in order to obtain or retain business *or other improper advantage* in the conduct of international business."[61] When Congress amended the language of the FCPA, however, rather than inserting "any improper advantage" immediately following "obtaining or retaining business" within the business nexus requirement (as does the Convention), it chose to add the "improper advantage" provision to the original list of abuses of discretion in consideration for bribes that the statute proscribes. Thus, as amended, the statute now prohibits payments to foreign officials not just to buy any act or decision, and not just to induce the doing or omitting of an official function "to assist ... in obtaining or retaining business for or with, or directing business to, any person,"[62] but also the making of a payment to such a foreign official to secure an "improper advantage" that will assist in obtaining or retaining business.[63]

The district court concluded, and defendants argue on appeal, that merely by adding the "improper advantage" language to the two existing kinds of prohibited acts acquired in consideration for bribes paid, Congress "again declined to amend the 'obtain or retain' business language in the FCPA."[64] In contrast,

---

[61] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, art. 1.1, S. Treaty Doc. No. 105-43, 37 I.L.M. 1, 4 (1998) (emphasis added).

[62] *See* 15 U.S.C. § 78dd-1(a)(1).

[63] *Id.*

[64] *Kay*, 200 F.Supp.2d at 686.

the government responds that Congress's choice to place the Convention language elsewhere merely shows that Congress already intended for the business nexus requirement to apply broadly, and thus declined to be redundant.

The Convention's broad prohibition of bribery of foreign officials likely includes the types of payments that comprise defendants' alleged conduct. The commentaries to the Convention explain that " '[o]ther improper advantage' refers to something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements."[65] Unlawfully reducing the taxes and customs duties at issue here to a level substantially below that which ARI was legally obligated to pay surely constitutes "something [ARI] was not clearly entitled to," and was thus potentially an "improper advantage" under the Convention.

As we have demonstrated, the 1977 and 1988 legislative history already make clear that the business nexus requirement is not to be interpreted unduly narrowly. We therefore agree with the government that there really was no need for Congress to add "or other improper advantage" to the requirement.[66] In fact, such an amendment might have

---

[65] Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 37 I.L.M. at 8 [hereinafter "Commentaries"].

[66] Although Congress intended to expand the scope of the FCPA in its implementation of the Convention, such expansion did not clearly implicate the business nexus element. Obviously, Congress added "any improper advantage" to the quid pro quo

inadvertently swept grease payments into the statutory ambit—or at least created new confusion as to whether these types of payments were prohibited—even though this category of payments was excluded by Congress in 1977 and remained excluded in 1988; and even though Congress showed no intention of adding this category when adopting its 1998 amendments.[67] That the Convention, which the Senate ratified without reservation and Congress implemented, would also appear to prohibit the types of payments at issue in this case only bolsters our conclusion that the kind of conduct allegedly engaged in by defendants can be violative of the statute.[68]

---

requirement. Other ways in which Congress intended to expand FCPA coverage included: (1) amending the statute to apply to "any person," instead of the more limited category of issuers registered under the 1934 Act and domestic concerns; (2) expanding the definition of "foreign official" to include officials of public international organizations; and (3) extending the FCPA to cover "acts of U.S. businesses and nationals in furtherance of unlawful payments that take place wholly outside the United States." S.Rep. No. 105-277, at 2-3.

[67] Even though the Commentaries to the Convention also excepted small facilitation payments from its scope, a change in the business nexus requirement to include "other improper advantage" still may have created undue confusion as to whether payments previously allowed were now prohibited by the statute, as the Convention's precise understanding of "facilitating payments" may ultimately differ with Congress's.

[68] Indeed, given the United States's ratification and implementation of the Convention without any reservation, understandings or alterations sp cifically pertaining to its scope, we would find it difficult to interpret the statute as narrowly as the defendants suggest: Such a construction would likely create a conflict with our international treaty obligations, with which we presume Congress meant to comply fully. *See* Restatement

4. *Summary*

Given the foregoing analysis of the statute's legislative history, we cannot hold as a matter of law that Congress meant to limit the FCPA's applicability to cover only bribes that lead directly to the award or renewal of contracts. Instead, we hold that Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person, and that bribes paid to foreign tax officials to secure illegally reduced customs and tax liability constitute a type of payment that can fall within this

---

(Third) of Foreign Relations Law, § 115, cmt. a (1987) ("It is generally assumed that Congress does not intend to repudiate an international obligation of the United States by nullifying a rule of international law or an international agreement as domestic law, or by making it impossible for the United States to carry out its obligations."); *Boureslan v. Aramco*, 857 F.2d 1014, 1023 (5th Cir.1988) (King, J. dissenting) (recognizing the "presumption that Congress does not intend to violate international law"). We recognize that there may be some variation in scope between the Convention and the FCPA. The FCPA prohibits payments inducing official action that "assist[s] ... in obtaining or retaining business"; the Convention prohibits payments that induce official action "to obtain or retain business or other improper advantage in the conduct of international business." Potential variation exists because it is unclear whether the Convention's "other improper advantage in the conduct of international business" language requires a business nexus to the same extent as does the FCPA. This case, however, does not require us to address potential discrepancies (including whether they exist) between the scope of the Convention and the scope of the statute, i.e., payments that clearly fall outside of the FCPA but clearly fall within the Convention's prohibition or vice versa, because we have already concluded that the type of bribery engaged in by defendants has the potential of violating the statute.

broad coverage. In 1977, Congress was motivated to prohibit rampant foreign bribery by domestic business entities, but nevertheless understood the pragmatic need to exclude innocuous grease payments from the scope of its proposals. The FCPA's legislative history instructs that Congress was concerned about both the kind of bribery that leads to discrete contractual arrangements and the kind that more generally helps a domestic payor obtain or retain business for some person in a foreign country; and that Congress was aware that this type includes illicit payments made to officials to obtain favorable but unlawful tax treatment.

Furthermore, by narrowly defining exceptions and affirmative defenses against a backdrop of broad applicability, Congress reaffirmed its intention for the statute to apply to payments that even indirectly assist in obtaining business or maintaining existing business operations in a foreign country. Finally, Congress's intention to implement the Convention, a treaty that indisputably prohibits any bribes that give an advantage to which a business entity is not fully entitled, further supports our determination of the extent of the FCPA's scope.

Thus, in diametric opposition to the district court, we conclude that bribes paid to foreign officials in consideration for unlawful evasion of customs duties and sales taxes *could* fall within the purview of the FCPA's proscription. We hasten to add, however, that this conduct does not automatically constitute a violation of the FCPA: It still must be shown that the bribery was intended to produce an effect—here,

through tax savings—that would "assist in obtaining or retaining business."

D. *Sufficiency of the Indictment*

As in every indictment, the instant indictment's allegations must clearly inform the defense of what it is that the government intends to prove in satisfying each element of the crime, and must enable the defendant to assert double jeopardy and not be subject to prosecution for charges not presented to the grand jury. Here, the question of sufficiency of the factual allegations centers on the business nexus element of the crime, viz., the producing-cause relationship between the substantial avoidance or evasion of duties and taxes and getting or keeping business in Haiti. This, in turn, poses the question, what allegations of the indictment, if any, so inform the defendants of the government's intended proof of such linkage as to be sufficient for mounting a defense?[69] Because the district court determined that the alleged bribes are of a type that can never be covered by the FCPA, that court never reached or addressed the sufficiency of the indictment vis-à-vis the business nexus element. We shall do so now in an effort to assist the district court's proceedings on remand.

We observe as a preliminary matter that this is the kind of case that a relatively few reported opinions

---

[69] *See, e.g., United States v. Richards*, 204 F.3d 177, 192 (5th Cir.2000) (finding that an indictment was sufficient, despite the supposed failure to allege clearly the materiality element of the offense, because the facts alleged "warrant[ed] an inference that the false statements were material") (citation omitted).

have analyzed to determine whether an indictment that sets out the elements of the offense charged *merely by tracking the words of the statute itself*, is insufficient. Most reported opinions that have addressed this issue appear to approve the practice of tracking the statute as long as the words used expressly set out all of the elements necessary to constitute the offense.[70] The cases in which an indictment that parrots the statute is held to be insufficient turn on a determination that the factual information that is *not* alleged in the indictment goes to the very *core of criminality* under the statute.

The Supreme Court took this approach in *Russell v. United States*,[71] in which it found indictments defective because the allegations under 2 U.S.C. § 192, which prohibits witnesses before congressional committees from "refus[ing] to answer any question pertinent to the question under inquiry,"[72] failed to identify the "question under inquiry." The Court ruled that the "core of criminality" under the statute was the pertinency to the subject under inquiry of the question a witness refused to answer.[73] The Court stated:

---

[70] *See, e.g., United States v. Davis*, 336 F.3d 920, 922-24 (9th Cir.2003); *United States v. Akers*, 215 F.3d 1089, 1101 (10th Cir.2000); *United States v. Monus*, 128 F.3d 376, 388 (6th Cir.1997); *United States v. Cochran*, 17 F.3d 56, 61 (3d Cir.1994); *United States v. Chandler*, 996 F.2d 1073, 1097 (11th Cir.1993); *United States v. Young*, 618 F.2d 1281, 1286 (8th Cir.1980).

[71] 369 U.S. 749 (1962).

[72] *Id.* at 752 n. 2.

[73] *Id.* at 764.

> Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute.[74]

The Court concluded that the indictments failed this test because, even though they did list the questions that the defendants had refused to answer, they failed totally to specify the topic under inquiry, which was the key to the legality or illegality of the defendants' acts.[75] In short, the defendants faced trial with the "chief issue undefined."[76]

The First Circuit, in *United States v. Murphy*,[77] followed *Russell* to invalidate an indictment that charged the defendant with threatening a particular witness to influence his testimony in an official proceeding. The indictment quoted the statute,[78] and identified the threatened witnesses and the date of the threat.[79] The indictment did not, however, identify any official proceeding. In invalidating the indictment for that omission, the First Circuit concluded that the missing information went to the core of criminality

---

[74] *Id.* at 771.

[75] *Id.* at 765-68.

[76] *Id.* at 766.

[77] 762 F.2d 1151 (1st Cir.1985).

[78] 18 U.S.C. § 1512(a)(1).

[79] *Murphy*, 762 F.2d at 1153.

under the statute. Without that information, reasoned the *Murphy* court, the defense did not know what proceeding the grand jury was charging the defendants with attempting to influence.[80]

United States v. Pirro[81] exemplifies the difficulties courts confront with this kind of issue. In that case, the indictment charged violations of Section 7206 of the Internal Revenue Code ("I.R.C."), which makes it a felony for "any person ... [to] [w]illfully make [ ] and subscribe [ ] any [tax] return ... which he does not believe to be true and correct as to every material matter."[82] The allegations were that the defendant, the company president who signed its tax return, failed to report another individual's "ownership interest" in the company on its tax return for a particular year, and also misstated his own ownership interest in that company on the return.[83] The *Pirro* majority concluded that the indictment was deficient in several respects, including its failure to charge a violation of a known legal right and its failure to allege the essential facts constituting the offense charged. In finding the indictment insufficient, the majority relied on the Supreme Court's opinion in *Russell*.[84] The flaw

---

[80] *Id.* at 1154-55 ("[T]he indictment was defective because it did not adequately apprise the defendants of the charges against them.").

[81] 212 F.3d 86 (2d Cir.2000).

[82] 26 U.S.C. § 7206(1). *See also Pirro*, 212 F.3d at 97.

[83] *Id.* at 87-88.

[84] *Id.* at 92-95.

identified by the *Pirro* majority was the indictment's failure to allege what it was that made the omission from the tax return criminal.[85] The allegation that the "ownership interest" of the chairman was not reported was found insufficient because the term "ownership interest" was *generic*, and no specifics were provided. The statute—I.R.C. § 7206(1)—prohibits an omission only if there is a duty to report.[86] The majority reasoned that because the term "ownership interest" is broader than "share ownership," and there was no duty to report the interest at issue, absent other shareholders, the government's allegation might (or might not) make the tax return incorrect and thus violative of the statute.[87]

The thrust of the vigorous dissent in *Pirro* was that the indictment did allege a crime and did so with sufficient specificity when it alleged that the defendant violated the law by failing to disclose identified ownership interests in the tax return.[88] The dissent emphasized that indictments that do little more than track the language of the statute and state the time and place of the alleged crime in proximate terms are sufficient.[89] In *Pirro*, the indictment provided dates and times, tracked the statute, and alleged all the

---

[85] *Id.* at 93.

[86] *Id.*

[87] *Id.* at 93-94.

[88] *Id.* at 100-04.

[89] *Id.* at 92-93.

elements of the offense by tracking the statute. The dissent found that the definition of the offense did not include any "generic term" that required a "descen[t] to particulars," asserting that even without the added information that the defendant wanted, the parties knew the issues.[90] Consequently, the dissent was satisfied that the indictment was sufficient, leaving for trial—not pretrial, on a scant record—the question whether the government could prove its case with sufficient evidence.[91]

Here, the issue can be phrased in a number of ways. In *Russell*-like terms, the issue is whether the alleged *quid pro quo* of bribery-obtained reductions in sales taxes and customs duties has an "intent-to-assist" nexus to obtaining or retaining business in the foreign country. As explained *ad nauseam* in the foregoing analysis of the legislative history of the FCPA, the "assist" nexus is indisputably the element of the crime that distinguishes it from garden-variety bribery on the broad end of the spectrum and bribery to obtain or retain a particular government contract on the narrow end.[92] In terms of the sufficiency of the indictment, however, the question is whether the business nexus element—which in the instant indictment is merely a paraphrase of that part of the statute—goes to the "core of criminality"[93] under the

---

[90] *Id.* at 93 (quoting *United States v. Cruikshank*, 92 U.S. 542 (1875)).

[91] *Id.* at 105.

[92] *See supra* at [81a-84a].

[93] *Russell*, 369 U.S. at 764.

statute and contains generic terms, requiring more particularity. Stated differently, the question is whether the lack of detail in that part of the indictment that deals with this one element is more like an absence of detail as to how the crime was committed than a failure to specify what the crime was.

Obviously, an indictment does not have to set out evidence or details of how a crime was committed as long as it gives the defendant notice of what the government is charging.[94] Here, the question is whether the statutory prohibition against a bribe that "assists [the defendant] in obtaining and retaining business" for some person can properly be viewed as containing only "generic" terms, which demand more particularity in the indictment. Without more, the words "assists" and "business" are certainly candidates for classification as generic terms. There are innumerable ways and degrees of assisting; and—as we have seen in conjunction with the FCPA's legislative history—"business" is as broad as it is tall. True, there are many crimes that include nexus elements, such as effects on interstate commerce or use of the mails in connection with a scheme to defraud, in which the nexus element cannot be said to go to the core of criminality. For such crimes, the courts appear to take the approach that those kinds of nexus elements can be alleged without factual detail and still not violate the Fifth or Sixth Amendments.

---

[94] *See, e.g., United States v. Ellender*, 947 F.2d 748 (5th Cir.1991) ("To comply with [Federal Rule of Criminal Procedure] 7(c), an indictment need not provide the evidentiary details of the government's case.") (citations omitted).

The line between deficient and sufficient factual detail in an indictment is not a bright one, particularly when, as here, the statute itself does not clearly define the offense. Although the instant indictment does allege in sufficient detail the linkage between the payment of bribes and the tax benefit obtained (*quid pro quo*), it does not detail any "assist" nexus between the tax benefit and getting or keeping business. Like the defendants, we are left to ask *how* the tax benefit was intended to *assist* in obtaining or retaining business, and *what* was the business or business opportunities sought to be obtained or retained? All that is known from the indictment is that the business involves rice imported into Haiti at below-legal tax and custom rates.

Although we recognize that lowering tax and customs payments presumptively increases a company's profit margin by reducing its cost of doing business, it does not follow, *ipso facto*,—as the government contends—that such a result satisfies the statutory business nexus element. Even a modest imagination can hypothesize myriad ways that an unwarranted reduction in duties and taxes in a large-volume rice import operation could *assist* in obtaining or retaining business. For example, it could, as already indicated, so reduce the beneficiary's cost of doing business as to allow the beneficiary to underbid competitors for private commercial contracts, government allocations, and the like; or it could provide the margin of profit needed to fend off potential competition seeking to take business away from the beneficiary; or, it could make the difference between an operating loss and an operating profit, without which the beneficiary could not even stay in

business; or it could free up funds to expend on legitimate lobbying or other influence-currying activities to favor the beneficiary's efforts to get, keep, or expand its share of the foreign business. Presumably, there are innumerable other hypothetical examples of how a significant diminution in duties and taxes could assist in getting or keeping particular business in Haiti; but that is not to say that such a diminution *always* assists in obtaining or retaining business. There are bound to be circumstances in which such a cost reduction does nothing other than increase the profitability of an already-profitable venture or ensure profitability of some start-up venture. Indeed, if the government is correct that anytime operating costs are reduced the beneficiary of such advantage is assisted in getting or keeping business, the FCPA's language that expresses the necessary element of assisting is obtaining or retaining business would be unnecessary, and thus surplusage—a conclusion that we are forbidden to reach.

If the business nexus element does go to the *core of criminality* of the FCPA, a criminal defendant cannot be left to read the government's mind to determine what existing businesses or future business opportunities the government might, at trial, try to link causally with assistance provided by a lessened customs and tax burden. If business nexus is core, then in addition to alleging at least minimally sufficient facts that, if proved, will meet the other elements of a violation of the FCPA (such as the citizenship of the briber, the identity of the qualified business entity, the particular instrumentalities of foreign and interstate commerce employed, the

identity of the foreign country and of the officials to whom the suspect payments are made, and the sought-after unlawful actions taken or not taken by the foreign official in consideration of the bribes), a sufficient FCPA indictment would also have to allege facts that at least minimally put the defense on notice of *what* business transactions or opportunities were purportedly sought to be obtained or retained, and *how* the results of the foreign official's unlawful acts were meant to "assist" in getting or keeping such business. In other words, if the business nexus element goes to the core of the FCPA's criminality, the indictment would have to allege facts that, if proved, would establish an intended causal *assistance* link between the illicit benefit of reduced taxes and duties and the obtaining or retaining of the business venture or activity thus identified.

As noted at the outset of this opinion, the indictment contains no such specific allegations. Except for closely paraphrasing the objective "purpose" language of the statute regarding the aim of the bribe being to produce some conduct by a foreign official, the results of which (*quid pro quo*) will assist in obtaining or retaining foreign business for some person (business nexus), the indictment alleges nothing whatsoever about (1) the nature of the assistance purportedly intended or produced by the lowered taxes, (2) the identity of the particular business or business opportunity the obtaining or retaining of which was being sought, or (3) the way (nexus) such assistance was supposed to help get or keep such business or

opportunity.[95] As such, the indictment's sufficiency hinges on a determination whether the business nexus element of the crime is core.[96]

We conclude that, as important to the statute as the business nexus element is, it does not go to the FCPA's core of criminality. When the FCPA is read as a whole, its core of criminality is seen to be bribery of a foreign official to induce him to perform an official duty in a corrupt manner. The business nexus element serves to delimit the scope of the FCPA by eschewing applicability to those bribes of foreign officials that are not intended to assist in getting or keeping business, just as the "grease" provisions eschew applicability of

---

[95] The potential lacuna in the instant indictment is distinguishable from the failure of the indictment clearly to allege the element of materiality in *Richards*, in which we found the indictment sufficient because the other facts alleged in it "warrant[ed] an inference that the false statements were material." 204 F.3d at 192. Except for the overbroad, generic reference to the rice business, no combination of facts here alleged in the indictment allow an inference of what business was purportedly obtained or retained or how the illicit tax savings produced by the bribery were intended to assist ARI or RCH in obtaining or retaining it.

[96] On appeal, as in the district court, defendants advance alternative bases for holding the indictment insufficient. One such defense was grounded in the rule of lenity in the face of the statute's ambiguity, and another was grounded in the fair-warning requirement of the Due Process Clause in the face of the dearth of case law on the subject. As today we reverse the district court's dismissal of the indictment as insufficient and remand for further proceedings which might include a requirement that the government be more specific regarding the business nexus element, we do not address these alternative propositions. They can, however, be addressed for the first time by the district court on remand.

the FCPA to payments to foreign officials to cut through bureaucratic red tape and thereby facilitate matters. Therefore, the indictment's paraphrasing of the FCPA's business nexus element passes the test for sufficiency, despite alleging no details regarding what business is sought or how the results of the bribery are meant to assist, passes the test for sufficiency.

III. CONCLUSION

We cannot credit the district court's *per se* ruling that the fiscal benefits of the mal-administration of foreign revenue laws by foreign officials in consideration for illicit payments by United States businessmen or business entities can never come within the scope of the FCPA. Just as bribes to obtain such illicit tax benefits do not *ipso facto* fall outside the scope of the FCPA, however, neither are they *per se* included within its scope. We are satisfied that—for purposes of the statutory provisions criminalizing payments designed to induce foreign officials unlawfully to perform their official duties in *administering* the laws and regulations of their country to produce a result intended to assist in obtaining or retaining business in that country—an unjustified reduction in duties and taxes can, under appropriate circumstances, come within the scope of the statute.

As the district court held the indictment insufficient based on its determination that the kind of bribery charged in the indictment does not come within the scope of the FCPA, that court never reached the question whether the indictment was sufficient as to the business nexus element of the crime, for which

the charging instrument merely tracked the statute without alleging any discrete facts whatsoever. As we conclude that the business nexus element of the FCPA does not go to the core of criminality of that statute, we hold that the indictment in this case is sufficient as a matter of law. For the foregoing reasons, therefore, the judgment of the district court dismissing the indictment charging defendants with violations of the FCPA is reversed and the case is remanded for further proceedings consistent herewith.

REVERSED and REMANDED.

APPENDIX A

SUPERSEDING INDICTMENT

The Grand Jury charges that:

GENERAL ALLEGATIONS

1. At all times material to this Indictment, the Foreign Corrupt Practices Act of 1977 (FCPA), as amended, 15 U.S.C. §§ 78dd-1, *et seq.*, was enacted by Congress for the purpose of, among other things, making it unlawful for United States persons, businesses and residents to use the United States mails, or any means or instrumentality of interstate or foreign commerce in furtherance of an offer, promise, authorization, or payment of money or anything of value to a foreign government official for the purpose of obtaining or retaining business for, or directing business to, any person.

2. At all times material to this Indictment:

a. American Rice, Inc. ("ARI") was a business incorporated under the laws of the State of Texas, and having its principal place of business in Houston, Texas. American Rice, Inc. had a class of securities registered pursuant to Section 15 of the Securities Exchange Act of 1934 (15 U.S.C. § 78*o*) and was required to file reports with the U.S. Securities & Exchange Commission under Section 12 of the Securities Exchange Act (15 U.S.C. § 78*l*). As such, American Rice, Inc. was an "issuer" within the meaning of the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1.

b. Rice Corporation of Haiti ("RCH") was a subsidiary of defendant American Rice, Inc. that was incorporated in the Republic of Haiti. RCH was formed to act as a "service corporation" to represent American Rice, Inc.'s interest in Haiti. At all times prior to September 1999, American Rice, Inc. controlled all of RCH's actions, paid all of RCH's expenses, employed all of RCH's management, retained title to all rice imported by RCH until sold to third parties and consolidated its financial statements with those of American Rice, Inc.

c. Defendant DAVID KAY was an American citizen and a vice-president for marketing of American Rice, Inc. who was responsible for supervising sales and marketing in Haiti. As such, KAY was an officer of an "issuer" and a "domestic concern" within the meaning of the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, 78dd-2.

d. Defendant DOUGLAS MURPHY was an American citizen and president of American Rice, Inc. As such, MURPHY was an officer of an "issuer" and a "domestic concern" within the meaning of the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, 78dd-2.

3. Beginning in or about 1995 and continuing to in or about August 1999, defendants KAY and MURPHY and other employees and officers of American Rice, Inc. paid bribes and authorized the payment of bribes to induce customs officials in the Republic of Haiti to accept bills of lading and other documents which intentionally understated the true amount of rice that ARI shipped to Haiti for import, thus reducing the customs duties owed by American Rice, Inc. and RCH to the Haitian government.

4. In addition, beginning in or about 1998 and continuing to in or about August 1999, defendant KAY and other employees and officers of American Rice, Inc. paid and authorized additional bribes to officials of other

Haitian agencies to accept the false import documents and other documents which understated the true amount of rice being imported into and sold in Haiti, thereby reducing the amount of sales taxes paid by RCH to the Haitian government.

5. In furtherance of these bribes, defendant KAY directed employees of American Rice, Inc. to prepare two sets of shipping documents for each shipment of rice to Haiti, one that accurately reflected and another that falsely represented the weight and value of the rice being exported to Haiti.

6. In furtherance of these bribes, defendants KAY and MURPHY, acting on his own behalf and as an agent of American Rice, Inc., agreed to pay and authorized the payment of bribes, calculated as a percentage of the value of the rice not reported on the false documents or in the form of a monthly retainer, to customs and tax officials of the Haitian government to induce these officials to accept the false documentation and to assess significantly lower customs duties and sales taxes than American Rice, Inc. would otherwise have been required to pay.

7. In furtherance of these bribes, defendants KAY and MURPHY authorized employees of American Rice, Inc. to withdraw funds from American Rice, Inc. bank accounts and to pay these funds to officials of the Haitian government, either directly or through intermediary brokers.

8. As a result of the bribes and the Haitian officials' acceptance of the false shipping documents, American Rice, Inc. reported only approximately 66% of the rice it actually imported into Haiti between January 1998 and August 1999 and thereby significantly reduced the amount of customs duties it was required to pay to the Haitian government.

9. As a further result of these bribes, American Rice, Inc., using official Haitian Customs documents reflecting the amounts reported on the false shipping documents, reported only approximately 66% of the rice it sold in Haiti and thereby significantly reduced the amount of sales taxes it was required to pay to the Haitian government.

COUNTS ONE—TWELVE

FOREIGN CORRUPT PRACTICES ACT (15 U.S.C. § 78dd-1)

10. The grand jury incorporates by reference the allegations set forth in paragraphs 1-9 above and charges that:

11. On or about the dates set forth below, in the Southern District of Texas and elsewhere, defendants DAVID KAY and DOUGLAS MURPHY, domestic concerns and officers of American Rice, Inc., an "issuer" within the meaning of the Foreign Corrupt Practices Act, did use and cause to be used instrumentalities

of interstate and foreign commerce, to wit, an overnight express service, facsimile transmissions, and an ocean-going barge, which were used to transport and transmit false shipping documents, corruptly in furtherance of an offer, payment, promise to pay and authorization of the payment of money to foreign officials, to wit, customs officials of the Government of the Republic of Haiti, directly and through third persons, for purposes of influencing acts and decisions of such foreign officials in their official capacities, inducing such foreign officials to do and omit to do acts in violation of their lawful duty, and to obtain an improper advantage, in order to assist American Rice, Inc. in obtaining and retaining business for, and directing business to, American Rice, Inc. and Rice Corporation of Haiti.

COUNT	DATE	BARGE
1	January 6, 1998	LaurieKristie
2	February 20, 1998	Balsa 51
3	April 20, 1998	LaurieKristie
4	June 4, 1998	LaurieKristie
5	June 27, 1998	LaurieKristie
6	October 7, 1998	LaurieKristie
7	December 7, 1998	LaurieKristie
8	February 16, 1999	LaurieKristie
9	April 14, 1999	LaurieKristie
10	May 27, 1999	LaurieKristie
11	June 30, 1999	LaurieKristie
12	August 3, 1999	Blumarlin

All in violation of Title 15, United States Code, Sections 78dd-1(a) and 78dd-2(a), and Title 18, United States Code, Section 2.

APPENDIX C

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

No. Crim.A. H-01-914

UNITED STATES OF AMERICA

v.

DAVID KAY AND DOUGLAS MURPHY

April 18, 2002

ORDER

HITTNER, District Judge.

Pending before the Court is Defendant David Kay's Motion to Dismiss Counts 1-12 for Failure to State an Offense Under 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).[1] Having considered the motion, submissions, and applicable law, as well as the parties' arguments at a hearing conducted on April 4, 2002, the Court determines that the motion should be granted.

---

[1] The indictment against Kay was filed on December 12, 2001. The indictment was superseded on March 25, 2002, adding Murphy as a defendant. The Court heard oral argument on Kay's motion to dismiss on April 4, 2002. The Court subsequently granted Murphy's unopposed motion to adopt Kay's motion to dismiss. Accordingly, the instant order applies to both Defendants.

I. INTRODUCTION

Defendants Douglas Murphy and David Kay are charged by a twelve-count indictment with violations of the Foreign Corrupt Practices Act of 1977 ("FCPA"), 15 U.S.C. §§ 78dd-1 *et seq.* The indictment alleges that Defendants, as president and vice president of American Rice, Inc. ("ARI"), made improper payments to officials in the Republic of Haiti to reduce customs duties and sales taxes owed by ARI to the Haitian government. Defendants now move to dismiss the indictment under Federal Rule of Criminal Procedure 12(b)(2).

II. LAW & ANALYSIS

The Court is asked to consider whether the allegations contained in the indictment are sufficient to state a claim under §§ 78dd-1(a) and 78dd-2(a) of the FCPA, which the parties agree is a matter of first impression in the federal courts. Defendants present the following arguments in support of dismissal:

- The plain language of the FCPA does not prohibit payments to reduce customs duties or tax obligations.
- The legislative history confirms that Congress intended to limit the types of acts made criminal by the FCPA.
- Under the rule of lenity, the Court must resolve all ambiguities in the statute in favor of the Defendants.
- The FCPA does not provide fair warning that the alleged conduct is prohibited.

A. Plain Language

The FCPA prohibits payments to a foreign official to "obtain or retain business."[2] *See* 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (2000). The question before the Court, therefore, is whether payments to foreign government officials made for the purpose of reducing customs duties and taxes fall under the scope of "obtaining or retaining business" pursuant to the text of the FCPA.

Defendants contend that the FCPA, on its face, does not prohibit such payments. Rather, the FCPA only prohibits payments made to "obtain or retain business," which, according to Defendants, limits the scope of the FCPA to payments to secure new business or to renew existing business. Here, Defendants argue that they did not make the alleged payments to Haitian officials to obtain new business or to renew existing business, as ARI had already established its business in Haiti and made the payments in issue to reduce customs duties and taxes on incoming goods.

The Government responds that the FCPA applies, without any textual limit, to all bribes made for the purpose of obtaining or retaining business. The Government further argues that Defendants' payments to reduce customs duties and sales taxes were essential to ARI to be able to conduct business in

---

[2] When the Court refers to "the FCPA" herein, it refers only to the provisions of §§ 78dd-1(a) and 78dd-2(a) of the FCPA that contain the phrase "obtaining or retaining business."

Haiti and, thus, the payments constituted prohibited payments made to retain business.[3]

The Government also argues that other provisions in the FCPA demonstrate that the statute is not as limited as Defendants suggest. Specifically, the Government points to the fact that the FCPA provides for an exception to liability for "routine governmental actions," which includes actions that are ordinarily and commonly performed by a foreign official in:

> (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
> (ii) processing governmental papers, such as visas and work orders;
> (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
> (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
> (v) actions of a similar nature.

15 U.S.C. §§ 78dd-1(f)(3)(A), 78dd-2(h)(4)(A) (2000). The Government argues that none of Defendants'

---

[3] The Government also states that Defendants argue that the phrase "obtain or retain business" is limited to obtaining or retaining *government contracts* or *commercial agreements*. The Court does not discern this limitation from Defendants' pleadings or arguments to the Court. Rather, Defendants argue that the alleged conduct did not constitute payments made to "obtain or retain business."

alleged payments fall under any of these exceptions; moreover, Congress used "specific, targeted exclusionary language to exclude particular types of payments" from the FCPA, thus intentionally confirming the statute's otherwise broad scope.

The parties thus take the respective positions that: (1) "the FCPA clearly and unambiguously limits the scope of the FCPA to payments to secure new business or renew existing business" (as advocated by Defendants), or (2) "the FCPA's unambiguous language plainly encompasses Defendants' bribery" (as advocated by the Government).

In applying criminal laws, federal courts must generally follow the plain and unambiguous language of the statute. *E.g., Salinas v. United States*, 522 U.S. 52, 57 (1997); *Johnson v. Sawyer*, 120 F.3d 1307, 1319 (5th Cir.1997). Reviewing the "obtain or retain business" language, together with the exceptions listed above, the Court determines that the FCPA is ambiguous under these circumstances.[4] Therefore, the Court turns to an analysis of the legislative history of the FCPA. *See, e.g., Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear.").

---

[4] For example, although not suggested by Defendants, one could argue that Defendants' conduct arguably falls under the "actions of a similar nature" exception for routine governmental actions. The Court by no means suggests that this is a defense in this case, but only points out that the language of the exceptions is not as clear as advocated by the Government.

B. Legislative History

1. 1977 Original Act

Congress enacted the FCPA in 1977 to, inter alia, stop bribery of foreign officials by domestic corporations. *United States v. Castle*, 925 F.2d 831, 834 (5th Cir.1991). The legislation was prompted, at least in part, by disclosures of corporate funds being used for illegal purposes and the high-profile "United Brands" scandal involving payments to Honduran government officials to reduce taxes on banana exports. *See* Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil & Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO.L.J. 1559, 1583-87 (1990).

In the course of enacting the FCPA, Congress considered and rejected two bills that would have broadened the scope of the FCPA's prohibited activities. The House bill prohibited corrupt payments to foreign officials used to influence "*any act or decision of such foreign official in his official capacity.*" H.R. 3815, 95th Cong. § 2 (1977) (emphasis added). The Senate bill prohibited any payments made for the purpose of "obtaining or retaining business . . . or directing business to, any person *or influencing legislation or regulations* of [the foreign government]. . . ." S. 305, 95th Cong. § 103 (1977) (emphasis added).

Congress rejected these proposals in favor of the phrase "obtain or retain business" as found in the current version of the FCPA. *See* 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (2000). As stated in the 1977 Conference Committee Report, "the purpose of the

payment must be to influence any act or decision of a foreign official (including a decision not to act) or to induce such official to use his influence to affect a government act or decision so as to assist an issuer in obtaining, retaining or directing business to any person." H.R.Conf.Rep. No. 95-831, at 12 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4121, 4124-25.

A court cannot "supply to construction what Congress has clearly shown its intention to omit." *Carey v. Donohue*, 240 U.S. 430, 437 (1916); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.") (internal citations omitted). A review of the above legislative history confirms that in 1977, Congress chose to limit the scope of the prohibited activities under the FCPA and did not intend to cover payments made to influence any and all governmental decisions. This legislative history weighs against the Government's argument that the FCPA should be construed so broadly so as to encompass payments made to reduce customs duties or tax obligations.

2. 1988 Amendments

In 1988, in response to business concerns that the FCPA placed American businesses at a competitive disadvantage in the foreign marketplace, Congress amended the FCPA. *See* Pitt & Groskaufmanis, *supra* at 1586-87. These amendments included exceptions for the "routine governmental action" discussed above. The House also sought to amend the FCPA to prohibit

payments to "obtain or retain business" that included payments for "procurement of legislative, judicial, regulatory, *or other action in seeking more favorable treatment by a foreign government.*" H.R.Conf.Rep. No. 100-576, at 918 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1951 (emphasis added). Congress rejected this proposed amendment in favor of the original statutory language, again limiting the FCPA's prohibition to payments made to "obtain or retain business."

Despite the fact that Congress rejected expansion of the statutory language, a 1988 House Conference Report contained the following commentary purporting to clarify the meaning of the existing "retaining business" statutory language:

> the reference to corrupt payments for "retaining business" in present law is not limited to the renewal of contracts or other business, but also includes a prohibition against corrupt payments related to the execution or performance of contracts or the carrying out of existing business, *such as a payment to a foreign official for the purpose of obtaining more favorable tax treatment. See, e.g., the United Brands* case.

Id. at 918, *reprinted in* 1988 U.S.S.C.A.N. at 1951 (emphasis added).

The Court declines to give the 1988 House Conference Report deference in its interpretation of the FCPA, as it consists of an after-the-fact interpretation of the term "retaining business" by a subsequent Congress more than ten years after the

enactment of the original language. *See Cent. Bank v. First Interstate Bank*, 511 U.S. 164, 185-86 (1994) ("[T]he interpretation given by one Congress (or committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute.") (quoting *Pub. Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 168 (1989)). More importantly, as discussed below, this "statement" of Congress does not relate to any change to the "obtain or retain business" language, as the 1988 Congress rejected alteration of that text.

The Government contends that this report should be accorded significant weight and persuasive value because it constitutes an authoritative expression of expert opinion as to the FCPA's history. As support for this proposition, the Government cites *Bell v. New Jersey*, 461 U.S. 773, 785-86 (1983), for the proposition that "Congress [is] at its most authoritative, adding . . . amendments to an already complex and sophisticated act. Congress is not merely expressing an opinion . . . but is acting on what it understands its own prior acts to mean." The Court has examined this statement, including its source, *Mount Sinai Hospital of Greater Miami, Inc. v. Weinberger*, 517 F.2d 329, 343 (5th Cir.1975), *modified by* 522 F.2d 179 (5th Cir.1975). A review of these authorities reveals that subsequent *enactments* of Congress are entitled "great weight in statutory construction." *See Bell*, 461 U.S. at 785-86 ("[N]ot only have members of Congress stated their views, but *Congress has acted on those views.* In 1974, *it enacted a provision* limiting [ ] liability. . . .") (emphasis added); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969) ("Subsequent *legislation* declaring the intent of an earlier statute is entitled to

great weight in statutory construction.") (emphasis added); *Mount Sinai*, 517 F.2d at 343 ("here we have Congress at its most authoritative, *adding complex and sophisticated amendments* to an already complex and sophisticated act") (emphasis added); *see also Bobsee Corp. v. United States*, 411 F.2d 231, 237 n. 18 (5th Cir.1969) ("Although a committee report written with regard to a *subsequent enactment* is not legislative history with regard to a previously enacted statute, it is entitled to some consideration as a secondarily authoritative expression of expert opinion.") (emphasis added). In each of these cases, the courts relied upon subsequent enactments as support for their interpretation of a statute's legislative history.

Here, in contrast, the Court is not asked to consider enactments of a subsequent Congress that would serve as guidance for the FCPA's original "obtain or retain business" language. Rather, in 1988, Congress *rejected* the House's proposal to expand the "obtain or retain business" language currently contained in the FCPA, and the 1988 House Conference Report attempts to "clarify" language that was never amended. Although the report might have provided authoritative explanation regarding the amendments that were proposed and adopted by Congress, the Court is not faced with that situation here. Instead, the 1988 House Conference Report consists of a belated interpretation of preexisting statutory language by the House, whose attempt to amend pertinent provisions of the statute had failed. The Court thus declines to give weight to the 1988 House Conference Report in its determination of the legislative history of the FCPA's "obtain or retain

business" text. *Cf. Mount Sinai*, 517 F.2d at 343 (describing pieces of "legislative history" that are of dubious value in statutory construction).[5]

There are additional reasons behind the Court's hesitance to attach value to the 1988 House Committee Report. As Defendants point out, "the suggestion that the existing FCPA was entitled to such an expansive interpretation begs the question of why the House of Representatives sought to amend the Act in the first place. Indeed, if the statute already covered the types of payments described in the self-serving conference report, there would have been no need to attempt to amend the statute to cover any payment 'seeking more favorable treatment by a foreign government.' " Further, the Court notes that Congress was aware of the United Brands case in 1977, yet it did not specifically include language in the original FCPA prohibiting payments to reduce tax obligations. Accordingly, this Court declines to give weight to the 1988 House Conference Report that purported to clarify the 1977 statutory language of the FCPA. Rather, the Court finds that the 1988 Congress

---

[5] Examples of these situations include: (1) a committee of Congress attempting to advise the courts of what it thought a prior Congress meant, (2) Congress attempting to enact a clarifying amendment only to be rebuffed by the President who signed the original and thinks it has a different meaning, (3) Congress failing to enact a clarifying amendment, from which ambiguous failure to act we are asked to draw some meaning, and (4) legislative history vaguely referring to the prior state of the law. *Mount Sinai*, 517 F.2d at 343 (internal citations omitted). The instant case is most analogous to a committee of Congress attempting to advise a court of what it thought a prior Congress meant. *Cf. id.*

considered and rejected expansion of the "obtain or retain business" phrase as found in the original FCPA.

3. 1998 Amendments

In 1998, in response to the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Officials in International Business Transactions ("the OECD Convention"), Congress again amended the FCPA. The OECD Convention had asked Congress to criminalize payments made to foreign officials "in order to obtain or retain business *or other improper advantage* in the conduct of international business." OECD Convention, art. 1(1), *reprinted in* 37 I.L.M. 1, 4 (1998) (emphasis added). Congress again declined to amend the "obtain or retain business" language in the FCPA.[6]

The Court thus determines that Congress has considered and rejected statutory language that would broaden the scope of the FCPA to cover the conduct in question here. Accordingly, the Court determines that the allegations in the indictment in this case do not fall under the scope of the FCPA. Counts one through twelve of the indictment against Defendants should therefore be dismissed.

C. Remaining Arguments

---

[6] Congress did not insert the "improper advantage" language into the "obtain or retain business" provision of the FCPA at issue herein. Congress did, however, add the "improper advantage" language into the clause of the statute setting out the alternative types of quid pro quos covered by the FCPA. *See* 15 U.S.C. §§ 78dd-1(a)(1)(A)(iii), 78dd-2(a)(1)(A)(iii) (2000).

As the Court determines that the the [*sic*] statute is not ambiguous when read in light of its legislative history, it will not consider Defendants' argument that the rule of lenity requires all doubts to be resolved in his favor. *See, e.g., United States v. Wells*, 519 U.S. 482, 499 (1997) ("The rule of lenity applies only if, after seizing everything from which aid can be derived, . . . [the court] can make no more than a guess as to what Congress intended.") (internal quotations omitted). Moreover, because the Court determines that the allegations in the indictment do not state a claim against Defendants under the FCPA, it need not address Defendants' alternative ground that the FCPA fails to provide fair warning that the Defendants' actions were criminal.

Given the foregoing, the Court determines that Defendants' conduct, as alleged in the indictment, does not state a claim under §§ 78dd-1(a) and 78dd-2(a) of the FCPA. Accordingly, the Court hereby

ORDERS that Defendant David Kay's Motion to Dismiss Counts 1-12 for Failure to State an Offense Under 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) is GRANTED. Counts one through twelve of the superseding indictment pending against Defendants David Kay and Douglas Murphy are hereby DISMISSED.

APPENDIX D

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

Nos. 05-20604

UNITED STATES OF AMERICA, Plaintiff-Appellee

v.

DAVID KAY; DOUGLAS MURPHY, Defendants-Appellants

January 10, 2008

ORDER ON PETITION FOR REHEARING

Before HIGGINBOTHAM, BARKSDALE and CLEMENT, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

I

David Kay and Douglas Murphy, executives of American Rice, Inc., were indicted for bribing Haitian officials in violation of the Foreign Corrupt Practices Act (FCPA). The district court dismissed the indictment, finding that the FCPA did not apply to Defendants' conduct. We held that the bribes alleged in the indictment could fall within the scope of the FCPA and remanded. On remand, Kay and Murphy were convicted on all counts. They appealed, and we affirmed their convictions. Defendants filed a Petition for Rehearing En Banc.

No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED. Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is also DENIED for the reasons that follow.

II

Defendants argue that the district court abused its discretion in instructing the jury on intent, urging that it gave a general intent instruction. Ultimately, labels aside, the issue reduces to the question of whether the jury was required to find that Defendants knew that their conduct was not legal. With that focus, we point to the charge and the arguments.

The jury instructions for the second element of the charge – "corruptly" – stated,

> An act is "corruptly" done if done voluntarily and intentionally, and with a *bad purpose* or *evil motive* of accomplishing either an *unlawful* end or result, or a lawful end or result by some unlawful method or means.[1]

---

[1] The instructions' language requiring "bad purpose" or "evil motive" suggests knowledge of unlawfulness. *See, e.g., Bryan v. United States*, 524 U.S. 184, 191-92 (1998) ("As a general matter, when used in the criminal context, a 'willful' act is one *undertaken with a 'bad purpose'* . . . In other words, in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.' " (emphasis added)); *see also id.* at 193 ("With respect to the . . . conduct . . . that is only criminal when done

> The term "corruptly" is intended to connote that the offer, payment, and promise was intended to induce the recipient to misuse his official position.[2]

Regardless of whether the jury instruction that Defendants contest would alone be a sufficient platform requiring unlawfulness, "jury instructions are to be judged as a whole, rather than by picking isolated phrases from them."[3] When reviewing the

---

'willfully.' . . . The jury must find that the defendant acted *with an evil-meaning mind*, that is to say, that he acted with knowledge that his conduct was unlawful."); *Cheek v. United States*, 498 U.S. 192, 200 (1991) (for the strictest level of intent in the tax context, the Supreme Court "described the term 'willfully' as connoting 'a voluntary, intentional violation of a known legal duty,' and did so with specific reference to the *'bad faith or evil intent' language*" (emphasis added)). But as indicated by *Bryan* and *Cheek*, instructions requiring knowledge of unlawfulness also typically include language specifically requiring an intent to violate the law. According to the Fifth Circuit's pattern instructions, the historical definition of willfully "means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids' that is to say, with bad purpose either to disobey or disregard the law." Fifth Circuit Pattern Jury Instructions (Criminal Cases) § 1.38 (2001). Those instructions acknowledge that "this definition is not accurate in every situation" and that "the term 'willfully' has 'defied any consistent interpretation by the courts.' " *Id.* (quoting *United States v. Granda*, 565 F.2d 922, 924 (5th Cir.1978)). In this case, we look to the jury instructions as a whole and the context of trial to ensure that the instructions adequately conveyed a requirement that the Government must prove that Defendants knew that their conduct was not legal – "unlawfulness."

[2] Emphasis added.

[3] *Hamling v. United States*, 418 U.S. 87, 107-08 (1974).

jury's understanding of the charge, we look to the total context of the trial, with the benefit of arguments by all counsel.[4] In this case, the court's instructions as a whole and considered in the context of trial required a finding that Defendants knew that their conduct was unlawful.

In addition to the requirement of corrupt intent, the indictment made the usual charges of aiding and abetting under 18 U.S.C. § 2, which provides,

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

In its instructions on aiding and abetting, before it instructed the jury on specific elements of the crime,

---

[4] *See, e.g., Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973) ("[W]e accept at the outset the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. While this does not mean that an instruction by itself may never rise to the level of constitutional error, it does recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction." (citations omitted)).

the court insisted on a finding of "intent to violate the law," stating,

> [Y]ou may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense, as defined in these instructions, was committed by some person or persons and that the defendant voluntarily participated in its commission with the intent to violate the law.

The jury was also instructed, "It is further the theory of [Defendants Kay and Murphy, respectively] that [they] never acted with corrupt intent in participating in the authorization of payments to customs officials" and that the "defense[] is valid under the law."

Also key to our holding are the closing arguments of both Government and Defense counsel. The requisite intent here only requires knowledge that one is doing something unlawful, and neither side suggested to the jury that Defendants could be convicted if there was a reasonable doubt of their knowledge of the "unlawfulness" of their conduct.[5]

---

[5] *Compare Cheek*, 498 U.S. at 199-200 ("The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses. Thus, the Court almost 60 years ago interpreted the statutory term 'willfully' as used in the federal criminal tax statutes as carving out an exception to the traditional rule [that ignorance of the law is no excuse]. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws.").

Kay's counsel in closing argument focused on the FCPA when addressing corrupt intent and argued that Kay was unaware of the FCPA, stating,

> And I'd ask that you turn to page 17 [including the instructions on corrupt intent]. "An act is 'corruptly' done if done voluntarily and intentionally and with a bad purpose or evil motive" – full stop. Full stop. Here's where the rubber meets the road. This is what you're going to have to decide. Did the man that you saw on the witness stand, did the man that you heard about in this trial act "with a bad purpose or an evil motive of accomplishing either an unlawful end or result or a lawful end" – "by unlawful method or means?" This is more than doing something bad. This is somebody acting with a bad purpose or evil motive to accomplish something unlawful. *This is somebody who wants to do something unlawful.*
>
> "The term 'corruptly' is intended to connote that the offer, payment, or promise was intended to induce the recipient to misuse his official position." We don't think he acted evilly; we don't think he acted badly; we don't think he was intending to do something unlawful; and we don't think he was trying to get customs to misuse their positions. He was trying to get customs to do what customs should have done.
>
> One thing that undoubtedly will come up is David's familiarity or lack of familiarity with

> the statute. And, obviously, he testified that he didn't have a clue that his conduct was violative of any federal law. Where in his life, when in his life would he have become familiar with the FCPA?
>
> . . . .
>
> An interesting piece about Theriot, their star witness. Theriot, of course testified, well, he was in a meeting in Houston and they passed out a document that everybody signed and everybody signed it saying, "We are not violating the FCPA, ha-ha-ha." Well, well, well. Where was that document? There are hundreds of exhibits in this case; and I didn't see that document, not Mr. Theriot's document, and no one else's document. Another obvious fabrication from Mr. Theriot offered to you in this trial.
>
> . . . .
>
> And, of course, they're going to imply to you that, "Well here's this document. 'FCPA,' that means David Kay must have known. That means David Kay has evil intent." Doesn't come close.[6]

The Government also focused on whether Defendants knew that they were violating the FCPA specifically, stating,

---

[6] Closing Argument of Reid Weingarten for David Kay.

> Now, the instruction on "corrupt intent" is on page 17 of your instructions. And the – what it says is before you. But what it does – what is clear is that corrupt intent has nothing to do with whether either defendant understood the FCPA, whether they had the intent to violate that law.[7]

In rebuttal, the Government further argued,

> Mr. Weingarten kept – said, "How – given all you know about Mr. Kay's background, how would he know about the FCPA? How would he know that what he was doing – how would he learn about the FCPA?" Well, it's irrelevant whether he learned about the FCPA. The question is how couldn't he know that paying bribes is wrong? That, ladies and gentlemen, that's not public relations, it's not politics, it's not even legal – legalities.
>
> If you were asked to pay a bribe and someone told you and – wouldn't you know it was wrong? And if you thought there was any possibility that it was illegal, wouldn't you check? And you heard from Mr. Kay himself he never asked anyone whether this was okay.[8]

The jury instructions on corrupt intent, looking to the instructions as a whole and the closing arguments of counsel, show that the jury did not believe that Defendants could be convicted if they did not know

---

[7] Closing Argument of Philip Urofsky for the Government.

[8] Rebuttal Argument of Philip Urofsky for the Government.

that they were doing something unlawful. The jury's question to the judge confirms this, indicating that the jury was unsure of whether Defendants knew that they were violating the FCPA specifically, not the law in general. The jury asked, "Can lack of knowledge of the FCPA be considered an accident or mistake?"

The defense understandably focuses on the differences underlying the gradations of intent and suggests that the opinion has offered the instruction here as satisfying both general intent and specific intent. To be clear, we return to first principles. That is, this case was tried on the basis that the Government had to prove that the Defendants knew that their actions violated the law, although they did not need to prove that they were aware of the specific provisions of the FCPA. Set in the context of trial, including the closing arguments of counsel, there was no uncertainty in the instructions regarding the Government's burden to prove that Defendants knew that their conduct was illegal. Mr. Weingarten argued forcefully and eloquently that his client could never have known the detail of the FCPA. The Government, while responding that they need not prove the specifics of the FCPA, made clear that it had to prove that Defendants knew that their conduct was illegal.

Our opinions have adequately addressed Defendants' other arguments. The Petition for Rehearing is DENIED.

APPENDIX E

United States
Court
Southern District
of Texas
ENTERED
JUL 06 2005
Michael N. Milby,
Clerk of Court

UNITED STATES DISTRICT COURT
Southern District of Texas
Holding Session in Houston

JUDGMENT IN A CRIMINAL CASE

UNITED STATES OF AMERICA
v.
DAVID KAY

CASE NUMBER: 4:01CR00914-001
USM NUMBER: 13749-179
Robert C. Bennett, Jr.
Defendant's Attorney

☐ See Additional Aliases.

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) 1SS - 13SS on October 6, 2004 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
15 U.S.C. § 78dd-1(a) and 78dd-2(a) and 18 U.S.C. § 2	Violation of the Foreign Corrupt Practices Act, aiding and abetting	01/06/1998	1SS

X See additional Counts of Conviction.

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

□ The defendant has been found not guilty on count(s) _____

□ Count(s) _____ □ is □ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court

and United States attorney of material changes in economic circumstances.

June 29, 2005
Date of Imposition of Judgment

/S/
Signature of Judge

DAVID HITTNER
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

July 1, 2005
Date

WR BP

DEFENDANT: **DAVID KAY**
CASE NUMBER: **4:01CR00914-001**

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
15 U.S.C. § 78dd-1(a) and 78dd-2(a) and 18 U.S.C. § 2	Violation of the Foreign Corrupt Practices Act, aiding and abetting	02/20/1998	2SS
15 U.S.C. § 78dd-1(a) and 78dd-2(a) and 18 U.S.C. § 2	Violation of the Foreign Corrupt Practices Act, aiding and abetting	04/20/1998	3SS
15 U.S.C. § 78dd-1(a) and 78dd-2(a) and 18 U.S.C. § 2	Violation of the Foreign Corrupt Practices Act, aiding and abetting	06/04/1998	4SS
15 U.S.C. § 78dd-1(a) and 78dd-2(a) and 18 U.S.C. § 2	Violation of the Foreign Corrupt Practices Act, aiding and abetting	06/27/1998	5SS
15 U.S.C. § 78dd-1(a) and	Violation of the Foreign	10/07/1998	6SS

78dd-2(a) and 18 U.S.C. § 2	Corrupt Practices Act, aiding and abetting		
15 U.S.C. § 78dd-1(a) and 78dd-2(a) and 18 U.S.C. § 2	Violation of the Foreign Corrupt Practices Act, aiding and abetting	12/07/1998	7SS
15 U.S.C. § 78dd-1(a) and 78dd-2(a) and 18 U.S.C. § 2	Violation of the Foreign Corrupt Practices Act, aiding and abetting	02/16/1999	8SS
15 U.S.C. § 78dd-1(a) and 78dd-2(a) and 18 U.S.C. § 2	Violation of the Foreign Corrupt Practices Act, aiding and abetting	04/14/1999	9SS
15 U.S.C. § 78dd-1(a) and 78dd-2(a) and 18 U.S.C. § 2	Violation of the Foreign Corrupt Practices Act, aiding and abetting	05/27/1999	10SS
15 U.S.C. § 78dd-1(a) and 78dd-2(a) and 18 U.S.C. § 2	Violation of the Foreign Corrupt Practices Act, aiding and abetting	06/30/1999	11SS

15 U.S.C. § 78dd-1(a) and 78dd-2(a) and 18 U.S.C. § 2	Violation of the Foreign Corrupt Practices Act, aiding and abetting	08/03/1999	12SS
18 U.S.C. § 371	Conspiracy to violate the laws of the United States with respect to a violation of the Foreign Corrupt Practices Act	09/30/1999	13SS

DEFENDANT: **DOUGLAS MURPHY**
CASE NUMBER: **4:01CR00914-002**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **37 months**

This term consists of THIRTY-SEVEN (37) MONTHS as to each of Counts 1SS – 13SS, to run concurrently, for a total of THIRTY-SEVEN (37) MONTHS.

The Court grants the defendant bond pending appeal to the United States Fifth Circuit Court of Appeals.

□ See Additional Imprisonment Terms

□ The court makes the following recommendations to the Board of Prisons:

□ The defendant is remanded to the custody of the United States Marshal.

□ The defendant shall surrender to the United States Marshal for this district:

□ at □ a.m. □ p.m. on _____.

□ as notified by the United States Marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

□ before 2 p.m. on _____.

X as notified by the United States Marshal.

□ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

DEFENDANT: **DAVID KAY**
CASE NUMBER: **4:01CR00914-001**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 2 years.

This term consists of TWO (2) YEARS as to each of Counts 1SS - 13SS, to run concurrently, for a total of TWO (2) YEARS.

□ See Additional Supervised Release Terms.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court. (*for offenses committed on or after September 13, 1994*)

X The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

X See Special Conditions of Supervision.

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within

seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **DAVID KAY**
CASE NUMBER: **4:01CR00914-001**

SPECIAL CONDITIONS OF SUPERVISION

The defendant is required to provide the probation officer access to any requested financial information. If a fine or restitution amount has been imposed, the defendant is prohibited from incurring new credit charges or opening additional lines of credit without approval of the probation officer.

DEFENDANT: **DAVID KAY**
CASE NUMBER: **4:01CR00914-001**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 1,300		

A $100 special assessment is ordered as to each of Counts 1SS - 13SS, for a total of $1,300.

□ See Additional Terms for Criminal Monetary Penalties.

□ The determination of restitution is deferred until ____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

□ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order of percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal payees must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

□ See Additional Restitution Payees.

TOTALS $ 0.00 $ 0.00

□ Restitution amount ordered pursuant to plea agreement $_____

□ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

□ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

□ the interest requirement is waived for the
□ fine □ restitution.

□ the interest requirement for the
□ fine □ restitution is modified as follows:

□ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: **DAVID KAY**
CASE NUMBER: **4:01cr00914-001**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A X Lump sum payment of $1,300 due immediately, balance due

□ not later than _____, or
X in accordance with □ C, □D, □ E or X F below; or

B □ Payment to begin immediately (may be combined with □ C, □ D or □ F below); or

C □ Payment in equal ___ installments of $_____ over a period of ____, to commence ____ days after the date of this judgment; or

D □ Payment in equal ____ installments of $_____ over a period of _____, to commence ____ days after release from imprisonment to a term of supervision; or

E □ Payment during the term of supervised release will commence within ____ days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F X Special instructions regarding the payment of criminal monetary penalties:

Make all payments payable to: U.S. District Clerk, Attn: Finance, P.O. Box 61010, Houston, TX 77208

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

□ Joint and Several

Case Number

Defendant and Co-Defendant Names (including defendant number)	**Total Amount**	**Joint and Several Amount**	**Corresponding Payee, if appropriate**

□ See Additional Defendants and Co-Defendants Held Joint and Several.

□ The defendant shall pay the cost of prosecution.

□ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

☐ See Additional Forfeited Property.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX F

United States
Court
Southern District
of Texas
ENTERED
JUL 06 2005
Michael N. Milby,
Clerk of Court

UNITED STATES DISTRICT COURT
Southern District of Texas
Holding Session in Houston

JUDGMENT IN A CRIMINAL CASE

UNITED STATES OF AMERICA
v.
DOUGLAS MURPHY

CASE NUMBER: **4:01CR00914-002**
USM NUMBER: 13987-179
Robert J. Sussman
Defendant's Attorney

☐ See Additional Aliases.

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) 1SS - 14SS on October 6, 2004 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
15 U.S.C. § 78dd-1(a) and 78dd-2(a) and 18 U.S.C. § 2	Violation of the Foreign Corrupt Practices Act, aiding and abetting	01/06/1998	1SS

X See additional Counts of Conviction.

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

□ The defendant has been found not guilty on count(s) _____

□ Count(s) _____ □ is □ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court

and United States attorney of material changes in economic circumstances.

June 29, 2005
Date of Imposition of Judgment

/S/
Signature of Judge

DAVID HITTNER
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

July 1, 2005
Date

WR BP

DEFENDANT: **DOUGLAS MURPHY**
CASE NUMBER: **4:01CR00914-002**

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
15 U.S.C. § 78dd-1(a) and 78dd-2(a) and 18 U.S.C. § 2	Violation of the Foreign Corrupt Practices Act, aiding and abetting	02/20/1998	2SS
15 U.S.C. § 78dd-1(a) and 78dd-2(a) and 18 U.S.C. § 2	Violation of the Foreign Corrupt Practices Act, aiding and abetting	04/20/1998	3SS
15 U.S.C. § 78dd-1(a) and 78dd-2(a) and 18 U.S.C. § 2	Violation of the Foreign Corrupt Practices Act, aiding and abetting	06/04/1998	4SS
15 U.S.C. § 78dd-1(a) and 78dd-2(a) and 18 U.S.C. § 2	Violation of the Foreign Corrupt Practices Act, aiding and abetting	06/27/1998	5SS
15 U.S.C. § 78dd-1(a) and	Violation of the Foreign	10/07/1998	6SS

78dd-2(a) and 18 U.S.C. § 2	Corrupt Practices Act, aiding and abetting		
15 U.S.C. § 78dd-1(a) and 78dd-2(a) and 18 U.S.C. § 2	Violation of the Foreign Corrupt Practices Act, aiding and abetting	12/07/1998	7SS
15 U.S.C. § 78dd-1(a) and 78dd-2(a) and 18 U.S.C. § 2	Violation of the Foreign Corrupt Practices Act, aiding and abetting	02/16/1999	8SS
15 U.S.C. § 78dd-1(a) and 78dd-2(a) and 18 U.S.C. § 2	Violation of the Foreign Corrupt Practices Act, aiding and abetting	04/14/1999	9SS
15 U.S.C. § 78dd-1(a) and 78dd-2(a) and 18 U.S.C. § 2	Violation of the Foreign Corrupt Practices Act, aiding and abetting	05/27/1999	10SS
15 U.S.C. § 78dd-1(a) and 78dd-2(a) and 18 U.S.C. § 2	Violation of the Foreign Corrupt Practices Act, aiding and abetting	06/30/1999	11SS

15 U.S.C. § 78dd-1(a) and 78dd-2(a) and 18 U.S.C. § 2	Violation of the Foreign Corrupt Practices Act, aiding and abetting	08/03/1999	12SS
18 U.S.C. § 371	Conspiracy to violate the laws of the United States with respect to a violation of the Foreign Corrupt Practices Act	09/30/1999	13SS
18 U.S.C. § 1505	Obstruction of justice before the United States Securities and Exchange Commission holding a proceeding with respect to a violation of the Foreign Corrupt Practices Act	10/18/2001	14SS

DEFENDANT: **DOUGLAS MURPHY**
CASE NUMBER: **4:01CR00914-002**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **63 months**

This term consists of THREE (3) MONTHS as to Count 1SS, followed by a consecutive term of SIXTY (60) MONTHS as to each of Counts 2SS - 14SS, to run concurrently to each other and consecutive to Count 1SS, for a total of SIXTY-THREE (63) MONTHS.

The Court grants the defendant bond pending appeal to the United States Fifth Circuit Court of Appeals.

□ See Additional Imprisonment Terms

□ The court makes the following recommendations to the Board of Prisons:

□ The defendant is remanded to the custody of the United States Marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

□ before 2 p.m. on _____.

X as notified by the United States Marshal.

□ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

DEFENDANT: **DOUGLAS MURPHY**
CASE NUMBER: **4:01CR00914-002**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 3 years.

This term consists of THREE (3) YEARS as to each of Counts 1SS - 14SS, to run concurrently, for a total of THREE (3) YEARS.

□ See Additional Supervised Release Terms.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court. (*for offenses committed on or after September 13, 1994*)

X The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

□ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

□ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

X See Special Conditions of Supervision.

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11)the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12)the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13)as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **DOUGLAS MURPHY**
CASE NUMBER: **4:01CR00914-002**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6

	Assessment	Fine	Restitution
TOTALS	$ 1,400		

A $100 special assessment is ordered as to each of Counts 1SS - 14SS, for a total of $1,400.

□ See Additional Terms for Criminal Monetary Penalties.

□ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

□ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order of percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal payees must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

□ See Additional Restitution Payees.

TOTALS $ 0.00 $ 0.00

□ Restitution amount ordered pursuant to plea agreement $_____

□ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

□ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

□ the interest requirement is waived for the
□ fine □ restitution.

□ the interest requirement for the
□ fine □ restitution is modified as follows:

□ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: **DOUGLAS MURPHY**
CASE NUMBER: **4:01cr00914-002**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A X Lump sum payment of $1,400 due immediately, balance due

□ not later than _____, or
X in accordance with □ C, □D, □ E or X F below; or

B □ Payment to begin immediately (may be combined with □ C, □ D or □ F below); or

C □ Payment in equal ___ installments of $_____ over a period of ____, to commence ____ days after the date of this judgment; or

D □ Payment in equal ____ installments of $_____ over a period of _____, to commence ____ days after release from imprisonment to a term of supervision; or

E □ Payment during the term of supervised release will commence within ____ days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F X Special instructions regarding the payment of criminal monetary penalties:

Make all payments payable to: U.S. District Clerk, Attn: Finance, P.O. Box 61010, Houston, TX 77208

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

□ Joint and Several

Case Number

Defendant and Co-Defendant Names (including defendant number)	**Total Amount**	**Joint and Several Amount**	**Corresponding Payee, if appropriate**

□ See Additional Defendants and Co-Defendants Held Joint and Several.

□ The defendant shall pay the cost of prosecution.

□ The defendant shall pay the following court cost(s):

□ The defendant shall forfeit the defendant's interest in the following property to the United States:

□ See Additional Forfeited Property.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX G

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part that no person shall "be deprived of life, liberty, or property, without due process of law."

Section 78dd-1 of Title 15 of the United States Code provides in relevant part:

(a) Prohibition. It shall be unlawful for any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to--

(1) any foreign official for purposes of--

(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof

to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person; . . .

Section 78dd-2 of Title 15 of the United State Code provides in relevant part:

(a) Prohibition. It shall be unlawful for any domestic concern, other than an issuer which is subject to section 78dd-1 of this title, or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person; . . .

Section 78ff of Title 15 of the United State Code provides in relevant part:

(a) Willful violations; false and misleading statements

Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

. . .

(c) Violations by issuers, officers, directors, stockholders, employees, or agents of issuers

(1)(A) Any issuer that violates subsection (a) or (g) of section 78dd-1 of this title shall be fined not more than $2,000,000.

(B) Any issuer that violates subsection (a) or (g) of section 78dd-1 of this title shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.

(2)(A) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 78dd-1 of this title shall be fined not more than $100,000, or imprisoned not more than 5 years, or both. . . .

100

FILED
JUL 25 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(4)

No. 07-1281

In the Supreme Court of the United States

DAVID KAY AND DOUGLAS MURPHY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
MATTHEW W. FRIEDRICH
Acting Assistant Attorney General
JOSEPH C. WYDERKO
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the indictment—which petitioners did not challenge until after they were convicted at trial—adequately alleged that petitioners acted "willfully" in violating the Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. 78dd-1 *et seq.*

2. Whether the court of appeals, after concluding that the legislative history of the FCPA demonstrated Congress's intent to prohibit the type of bribes paid by petitioners, properly declined to apply the rule of lenity in construing the statute.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 8
Conclusion 17

TABLE OF AUTHORITIES

Cases:

Bifulco v. *United States*, 447 U.S. 381 (1980) 14
Bryan v. *United States*, 524 U.S. 184 (1998) 7
Crandon v. *United States*, 494 U.S. 152 (1990) 15, 17
Holloway v. *United States*, 526 U.S. 1 (1999) 15
Hughey v. *United States*, 495 U.S. 411 (1990) 16
Ladner v. *United States*, 358 U.S. 169 (1958) 15
Moskal v. *United States*, 498 U.S. 103 (1990) 14
Muscarello v. *United States*, 524 U.S. 125 (1998) 14, 15
Ratzlaf v. *United States*, 510 U.S. 135 (1994) 16
Reno v. *Koray*, 515 U.S. 50 (1995) 7, 15
Smith v. *United States*, 508 U.S. 223 (1993) 14
United States v. *Allen*, 406 F.3d 940 (8th Cir. 2005), cert. denied, 127 S. Ct. 826 (2006) 9
United States v. *Avery*, 295 F.3d 1158 (10th Cir.), cert. denied, 537 U.S. 1024 (2002) 10
United States v. *Childress*, 58 F.3d 693 (D.C. Cir. 1995), cert. denied, 516 U.S. 1098 (1996) 10
United States v. *Coleman*, 656 F.2d 509 (9th Cir. 1981) 12

Cases—Continued: Page

United States v. *Cor-Bon Custom Bullet Co.*, 287 F.3d 576 (6th Cir.), cert. denied, 537 U.S. 880 (2002) 9

United States v. *Corporan-Cuevas*, 244 F.3d 199 (1st Cir.), cert. denied, 534 U.S. 880 (2001) 9

United States v. *Du Bo*, 186 F.3d 1177 (9th Cir. 1999) 9, 11

United States v. *Gibson*, 409 F.3d 325 (6th Cir. 2005) ... 10

United States v. *Granderson*, 511 U.S. 39 (1994) 14

United States v. *Higgs*, 353 F.3d 281 (4th Cir. 2003) 9

United States v. *James*, 980 F.2d 1314 (9th Cir. 1992), cert. denied, 510 U.S. 838 (1993) 12

United States v. *Pheaster*, 544 F.2d 353 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977) 12

United States v. *Prentiss*, 256 F.3d 971 (10th Cir. 2001) 9

United States v. *Previte*, 648 F.2d 73 (1st Cir. 1981) 10

United States v. *R.L.C.*, 503 U.S. 291 (1992) 14, 16

United States v. *Resendez-Ponce*, 549 U.S. 102 (2007) ... 9

United States v. *Robinson*, 367 F.3d 278 (5th Cir.), cert. denied, 543 U.S. 1005 (2004) 9

United States v. *Sabbeth*, 262 F.3d 207 (2d Cir. 2001) 10

United States v. *Spinner*, 180 F.3d 514 (3d Cir. 1999) 9, 12

United States v. *Trennell*, 290 F.3d 881 (7th Cir.), cert. denied, 537 U.S. 1014 (2002) 9

United States v. *Vitillo*, 490 F.3d 314 (3d Cir. 2007) 12

United States v. *Vogt*, 910 F.2d 1184 (4th Cir. 1990), cert. denied, 498 U.S. 1083 (1991) 10

Cases—Continued: Page

United States v. *Wander*, 601 F.2d 1251 (3d Cir. 1979) 12
United States v. *Watkins*, 709 F.2d 475 (7th Cir. 1983) 10
United States v. *Wells*, 519 U.S. 482 (1997) 15
United States v. *White*, 241 F.3d 1015 (8th Cir. 2001) ... 10

Statutes:

Foreign Corrupt Practices Act of 1977, 15 U.S.C. 78dd-1 *et seq.*:
15 U.S.C. 78dd-1 4
15 U.S.C. 78dd-1(a) 2, 4
15 U.S.C. 78dd-1(a)(1) 3, 13
15 U.S.C. 78dd-1(b) 5, 14
15 U.S.C. 78dd-1(c) 5
15 U.S.C. 78dd-1(f)(3) 14
15 U.S.C. 78dd-2(a) 2
15 U.S.C. 78ff(a) 4
15 U.S.C. 78ff(c)(2)(A) 4
18 U.S.C. 371 ..... 2, 4
18 U.S.C. 1505 2

Miscellaneous:

H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. (1988) ... 6
Webster's Third New International Dictionary of the English Language (1993) 13

In the Supreme Court of the United States

No. 07-1281

DAVID KAY AND DOUGLAS MURPHY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-52a, 53a-108a) are reported at 513 F.3d 432 and 359 F.3d 738, respectively. The opinion of the district court (Pet. App. 109a-121a) is reported at 200 F. Supp. 2d 681.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2007. A petition for rehearing was denied on January 10, 2008 (Pet. App. 122a-130a). The petition for a writ of certiorari was filed on April 9, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioners were each convicted on 12 counts of paying bribes to

foreign officials, in violation of the Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. 78dd-1(a) and 78dd-2(a); and one count of conspiring to do so, in violation of 18 U.S.C. 371. Murphy was also convicted of obstructing a proceeding before the Securities and Exchange Commission (SEC), in violation of 18 U.S.C. 1505. Kay was sentenced to 37 months of imprisonment, to be followed by two years of supervised release. Pet. App. 131a-148a. Murphy was sentenced to 63 months of imprisonment, to be followed by three years of supervised release. *Id.* at 149a-165a.

1. Petitioners were officers of American Rice, Inc. (ARI), a publicly-traded company based in Houston that processes and sells rice throughout the world. Murphy was the president and chief executive officer, and Kay was a vice president who reported directly to Murphy. Pet. App. 2a; Gov't C.A. Br. 4.

In the 1990s, ARI opened a rice processing plant in Haiti, and it formed the Rice Corporation of Haiti (RCH) to operate the plant. ARI shipped rice in bulk from Texas to Haiti, where the rice was processed and bagged for distribution. The Republic of Haiti required rice importers to pay substantial customs duties and taxes on their rice shipments and sales. Pet. App. 2a; Gov't C.A. Br. 4-6. Petitioners became concerned that the required payments put ARI at a competitive disadvantage relative to smugglers who evaded the payments and competitors who bribed customs officials to accept reduced payments. Gov't C.A. Br. 7-9; see Pet. App. 8a & n.14.

In January 1998, petitioners decided to reduce ARI's payments by under-invoicing the amount of rice in their shipments and bribing Ha tian customs officials to accept the false documents. They directed ARI employees

to prepare two sets of documents for each shipment: one for internal use that accurately reflected the amount of rice, and another for presentation to customs officials that under-declared the amount by up to 50%. Petitioners authorized RCH employees to pay bribes to the customs officials to accept the false invoices. Gov't C.A. Br. 9-11. Between January 1998 and August 1999, petitioners authorized the use of false documents and the payment of bribes in connection with 12 shipments of rice. For those shipments, ARI under-declared 29,987 metric tons of rice valued at over $7.7 million, resulting in a total gross savings of over $1.5 million and a total net savings (after the payment of the bribes) of over $1 million. *Id.* at 11-12.

In October 1999, Murphy was fired by ARI. In 2001, he testified under oath in connection with an investigation by the SEC. During his testimony, Murphy lied about his knowledge of the false shipping documents and his involvement in the bribes paid to Haitian officials. Gov't C.A. Br. 13-14.

2. A grand jury in the Southern District of Texas returned an indictment charging petitioners with 12 counts of violating the FCPA, which prohibits publicly traded companies and their officers from making "use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of" a bribe to a foreign official for purposes of influencing the official's actions "in order to assist [the company] in obtaining or retaining business for or with * * * any person." 15 U.S.C. 78dd-1(a)(1). Pet. App. 110a. Under 15 U.S.C.

78ff(c)(2)(A), an officer who "willfully" violates the FCPA is subject to criminal penalties.[1]

Petitioners moved to dismiss the indictment. They argued that the payment of bribes to foreign officials to reduce customs duties and taxes did not satisfy the so-called "business nexus" element of the FCPA, *i.e.*, that the bribes "assist * * * in obtaining or retaining business." 15 U.S.C. 78dd-1(a). Petitioners claimed that the business nexus element limited the scope of the FCPA to bribes paid to secure new business or to retain existing business. Pet. App. 113a. The district court agreed and dismissed the indictment. *Id.* at 109a-121a.

3. The court of appeals reversed. Pet. App. 53a-108a. It concluded that "bribes paid to foreign officials in consideration for unlawful evasion of customs duties and sales taxes *could* fall within the purview of the FCPA's proscription" when "the bribery was intended to produce an effect—here, tax savings—that would 'assist in obtaining or retaining business.'" *Id.* at 89a-90a.

The court of appeals agreed with the district court that the "obtain[] or retain[] business" language was ambiguous. Pet. App. 62a, 67a. But after examining legislative history, *id.* at 67a-87a, the court concluded that Congress did not intend "to limit the FCPA's applicability to cover only bribes that lead directly to the award or renewal of contracts," *id.* at 88a.

When the FCPA was enacted in 1977, the court of appeals noted, the initial House bill contained no limit-

---

[1] Petitioners incorrectly cite 15 U.S.C. 78ff(a) for the proposition that the FCPA criminalizes only "willful" violations. Pet. 2, 7, 9, 12, 13. But that provision applies to "[a]ny person who willfully violates any provision of this chapter (*other than* section 78dd-1 of this title)" (emphasis added). An individual who willfully violates Section 78dd-1 is subject to criminal penalties under 15 U.S.C. 78ff(c)(2)(A).

ing "business nexus" element, but Congress adopted the Senate's proposal to include such an element. Pet. App. 68a-70a. That proposal was based on an SEC Report that had identified four types of illegal payments, including payments "made with the intent to assist the company in obtaining or retaining government contracts." *Id.* at 71a (internal quotation marks omitted). The court concluded "that, in using the word 'business' when it easily could have used the phraseology of [the] SEC Report, Congress intended for the statute to apply to bribes beyond the narrow band of payments sufficient only to 'obtain or retain government contracts.'" *Id.* at 73a.

The court of appeals found additional support for its conclusion in the 1988 amendments to the FCPA, which added an explicit statutory exception for payments "to expedite or to secure the performance of a routine governmental action," 15 U.S.C. 78dd-1(b), as well as an affirmative defense for payments that were legal in the country in which they were offered or that constituted bona fide expenditures directly related to the promotion of products or services or the execution or performance of a contract, see 15 U.S.C. 78dd-1(c). Those amendments, the court reasoned, "illustrate[d] an intention by Congress to identify very limited exceptions to the kinds of bribes to which the FCPA does not apply." Pet. App. 77a. In addition, the court noted that, in rejecting a proposed amendment to the language of the business nexus element, the Conference Committee stated that the statute was "not limited to the renewal of contracts or other business, but also include[d] a prohibition against corrupt payments related to the execution or performance of contracts or the carrying out of existing business, *such as a payment to a foreign official for the purpose*

of obtaining more favorable tax treatment." *Id.* at 79a (quoting H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 918 (1988)).

4. On remand, the grand jury returned a second superseding indictment. With respect to the 12 counts charging both petitioners with violating the FCPA, the indictment added allegations that petitioners "believed that if American Rice Inc. and Rice Corporation of Haiti were required to pay the full amount of duties and taxes that should have been paid on the imported rice they would not have been able to sell the rice at a competitive price, would have lost sales to competitors, and would not have realized an operating profit, thus putting at risk American Rice Inc.'s and Rice Corporation of Haiti's business operations in Haiti." C.A. R.E. Tab 3, at 3. The indictment also added a count charging both petitioners with conspiring to violate the FCPA and a count charging petitioner Murphy with obstructing justice by making false statements in his testimony in the SEC proceeding. *Id.* at 7-14.

After a trial, a jury found both petitioners guilty on all counts. More than five months later, petitioners moved to dismiss the FCPA counts, arguing, for the first time, that the indictment failed to allege that petitioners acted "willfully." The district court denied the motion, C.A. R.E. Tab 11, and proceeded to impose sentence, Pet. App. 131a-148a, 149a-165a.

5. The court of appeals affirmed. Pet. App. 1a-52a. The court rejected petitioners' claim that the FCPA failed to give fair notice that their conduct was illegal. *Id.* at 5a-18a. The court held that the business nexus element of the statute was not vague, explaining that "[i]mprecise general language in one of seven requirements for a bribery conviction under the FCPA does not

draw a line so vague that [petitioners] were not reasonably aware of their potential for engaging in illegal activity under the FCPA when they made payments to Haitian officials to reduce tax and duty burdens through misrepresentations." *Id.* at 7a-8a. And the court concluded that the FCPA was not sufficiently ambiguous to merit application of the rule of lenity. *Id.* at 15a-18a. It observed that the rule of lenity "only applies in situations of ambiguity more extreme than here, where, 'after seizing everything from which aid can be derived, [a court] can make no more than a guess as to what Congress intended.'" *Id.* at 15a-16a (brackets in original) (quoting *Reno* v. *Koray*, 515 U.S. 50, 65 (1995)). In the case of the FCPA, the court concluded, the legislative history resolved any textual ambiguity because it "show[ed] that Congress meant to prohibit a range of payments wider than those that directly influence the acquisition or retention of government contracts or similar commercial or industrial arrangements." *Id.* at 17a-18a (internal quotation marks omitted).

The court of appeals also held that the indictment sufficiently alleged the "willfully" element of a criminal FCPA violation. Pet. App. 29a-31a. The court noted that the indictment "omitted the term 'willful,'" but concluded that "this omission was harmless error at most, as the language of the indictment described the exact type of conduct required for a finding of willfulness." *Id.* at 30a. The court observed that "criminal willfulness requires only that criminal defendants have knowledge that they are acting unlawfully or 'knowledge of the facts that constitute the offense,' depending on the definition followed." *Ibid.* (quoting *Bryan* v. *United States*, 524 U.S. 184, 193 (1998)). Referring to its earlier discussion of the jury instructions—which, the court of appeals

had held, properly required the jury to find willfulness in the sense that "a defendant knew that he was doing something generally 'unlawful' at the time of his action, *id.* at 27a—the court concluded that the "corruptly" language in the indictment "sufficiently charge[d] an intentional act." *Id.* at 30a (internal quotation marks omitted). The court also noted that other language in the indictment "sufficiently alleged the element of willfulness by using language that directly asserted [petitioner's] knowing commission of acts that are unlawful generally and unlawful under the FCPA." *Id.* at 31a.

ARGUMENT

Petitioners contend (Pet. 11-17) that the failure of the indictment to include an element of the offense can never be harmless error. Although that issue has divided the courts of appeals and warrants this Court's review in an appropriate case, this case does not properly present that issue because petitioners failed to challenge the indictment until after they were found guilty at trial. Petitioners also argue (Pet. 17-30) that the rule of lenity precludes the application of the FCPA to their conduct. The court of appeals correctly stated the rule of lenity and determined that its application in this case was unwarranted. The court's interpretation of the FCPA does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioners suggest (Pet. 11-17) that this Court should grant review to decide whether the omission of an element of an offense from an indictment can constitute harmless error. As petitioners note (Pet. 11-12), this Court recently granted review to decide that question, but it ultimately resolved the case by finding that

the indictment contained all of the elements of the offense and thus presented no harmless-error issue. See *United States* v. *Resendez-Ponce*, 549 U.S. 102 (2007). The pre-*Resendez-Ponce* split continues to exist. The majority of the courts of appeals have held that such an omission (or the omission of a sentence-enhancing fact) is subject to harmless-error analysis. See *United States* v. *Allen*, 406 F.3d 940, 943-945 (8th Cir. 2005) (en banc), cert. denied, 127 S. Ct. 826 (2006); *United States* v. *Robinson*, 367 F.3d 278, 285-286 (5th Cir.), cert. denied, 543 U.S. 1005 (2004); *United States* v. *Higgs*, 353 F.3d 281, 304-307 (4th Cir. 2003); *United States* v. *Trennell*, 290 F.3d 881, 889-890 (7th Cir.), cert. denied, 537 U.S. 1014 (2002); *United States* v. *Cor-Bon Custom Bullet Co.*, 287 F.3d 576, 580-581 (6th Cir.), cert. denied, 537 U.S. 880 (2002); *United States* v. *Prentiss*, 256 F.3d 971, 981-985 (10th Cir. 2001) (en banc); *United States* v. *Corporan-Cuevas*, 244 F.3d 199, 202 (1st Cir.), cert. denied, 534 U.S. 880 (2001). The Third and Ninth Circuits, on the other hand, have held that such omissions constitute structural error and require reversal. See *United States* v. *Spinner*, 180 F.3d 514, 515-516 (3d Cir. 1999); *United States* v. *Du Bo*, 186 F.3d 1177, 1179-1181 (9th Cir. 1999).

Contrary to petitioners' contention (Pet. 12-13), however, this case is not a suitable, much less an "ideal," vehicle for resolving the question. Petitioners argue (Pet. 12) that the FCPA counts of the indictment were deficient because they failed to allege that petitioners acted "willfully." But unlike the defendant in *Resendiz-Ponce*, see U.S. Br. at 3, *Resendiz-Ponce*, *supra* (No. 05-998), petitioners did not challenge the sufficiency of the indictment until several months after the jury returned its verdicts. The consequence of petitioners' failure to

raise their challenge before trial is that the indictment must be read liberally in favor of its sufficiency, and, under that standard, the indictment is sufficient to withstand petitioners' challenge. Thus, this case, like *Resendez-Ponce*, is not an appropriate vehicle for resolution of the harmless-error issue.

The courts of appeals agree that "[t]he scrutiny given to an indictment depends, in part, on the timing of a defendant's objection to that indictment," and an indictment challenged after the completion of the government's case should be construed "in a liberal manner" in favor of sufficiency. *United States* v. *Sabbeth*, 262 F.3d 207, 218 (2d Cir. 2001). Thus, "[w]here a defendant first challenges 'the absence of an element of the offense' after a jury verdict," the indictment is "sufficient unless it is so defective that by any reasonable construction, it fails to charge the offense for which the defendant is convicted." *United States* v. *Avery*, 295 F.3d 1158, 1174 (10th Cir.), cert. denied, 537 U.S. 1024 (2002). See *United States* v. *Gibson*, 409 F.3d 325, 331 (6th Cir. 2005); *United States* v. *White*, 241 F.3d 1015, 1021 (8th Cir. 2001); *United States* v. *Childress*, 58 F.3d 693, 720 (D.C. Cir. 1995), cert. denied, 516 U.S. 1098 (1996); *United States* v. *Vogt*, 910 F.2d 1184, 1201 (4th Cir. 1990), cert. denied, 498 U.S. 1083 (1991); *United States* v. *Watkins*, 709 F.2d 475, 478 (7th Cir. 1983); *United States* v. *Previte*, 648 F.2d 73, 80 (1st Cir. 1981).

The decision below is fully consistent with that settled rule. As the court of appeals explained, the omission of the term "willfully" in the FCPA counts of the indictment was "harmless error at most, as the language of the indictment described the exact type of conduct required for a finding of willfulness." Pet. App. 30a. The court observed that although the indictment did not

use the word "willfully," its factual allegations described quintessentially dishonest conduct, *i.e.*, that petitioners created false shipping documents and bribed Haitian officials to accept them, thereby cheating the Haitian government out of customs duties and sales taxes. *Id.* at 30a-31a. That is not the type of conduct that an ordinary person believes is lawful. Coupled with the indictment's additional allegation that petitioners acted "corruptly," the facts alleged in the indictment sufficiently charged the willfulness element of an FCPA violation under the liberal standard that applies to a post-trial challenge to the sufficiency of an indictment.[2]

Contrary to petitioners' contention (Pet. 12-13), the result in this case would not have been different had the case arisen in the Ninth Circuit. Although the Ninth Circuit held in *Du Bo* that "failure to recite an essential element of the charged offense is not a minor or technical flaw subject to harmless error analysis," 186 F.3d at 1179, the court expressly noted that its holding was "limited to cases where a defendant's challenge is time-

---

[2] Petitioners assert (Pet. 9-10, 14 n.3) that the court of appeals held that the indictment sufficiently alleged willfulness only in the sense that the defendants acted knowingly, not in the sense that the defendants knew they were committing unlawful acts. But after explaining that "the language of the indictment described the exact type of conduct required for a finding of willfulness," the court observed that, "[a]s we discussed in detail in the context of jury instructions, criminal willfulness requires only that criminal defendants have knowledge that they are acting unlawfully or 'knowledge of the facts that constitute the offense,' depending on the definition followed." Pet. App. 30a (citation omitted). And the court had earlier concluded that the jury instructions were sufficient because they captured *both* of those definitions of willfulness. *Id.* at 22a-27a. Thus, the opinion indicates that the court evaluated the sufficiency of the indictment under both definitions of willfulness. *Id.* at 30a-31a.

ly," *id.* at 1180 n.3. The court acknowledged that "[u]ntimely challenges to the sufficiency of an indictment are reviewed under a more liberal standard." *Ibid.*; see *United States* v. *James*, 980 F.2d 1314, 1317 (9th Cir. 1992) ("When the sufficiency of the indictment is challenged after trial, it is only required that 'the necessary facts appear in *any form* or *by fair construction* can be found within the terms of the indictment.'"), cert. denied, 510 U.S. 838 (1993); *United States* v. *Coleman*, 656 F.2d 509, 510 (9th Cir. 1981) ("[W]e believe the indictment must be liberally construed because [the defendant] failed to raise any objection to it until after trial.").

Nor would the result have been different had this case arisen in the Third Circuit. Although that court has stated that the "[f]ailure of an indictment sufficiently to state an offense is a fundamental defect . . . and it can be raised at any time," *Spinner*, 180 F.3d at 516 (brackets in original) (quoting *United States* v. *Wander*, 601 F.2d 1251, 1259 (3d Cir. 1979)), it has also recognized that "indictments which are tardily challenged are liberally constructed in favor of validity," *Wander*, 601 F.2d at 1259 (quoting *United States* v. *Pheaster*, 544 F.2d 353, 361 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977)). See *United States* v. *Vitillo*, 490 F.3d 314, 324 (3d Cir. 2007).

Because the indictment sufficiently alleged the willfulness element of an FCPA violation under the liberal-construction standard that governs a post-trial challenge to the sufficiency of an indictment, the question whether the omission of an element of an offense from an indictment can constitute harmless error is not presented in this case. Petitioners' claim therefore does not warrant this Court's review.

2. Petitioners also argue (Pet. 17-34) that the court of appeals erred in holding that the business nexus element of the FCPA is not limited to bribes paid to foreign officials to acquire or retain contracts but also reaches bribes paid to secure reduced customs duties and taxes when the resulting savings benefit the company's existing business. The court below is the first court of appeals to consider the interpretation of the business nexus element, and petitioners do not suggest that its decision conflicts with any decision of any other court or appeals. Instead, petitioners object that the court of appeals did not properly apply the rule of lenity. That claim lacks merit. More to the point, in the absence of any conflict in the construction of a particular statute, the alleged misapplication of a properly stated principle of statutory interpretation does not warrant this Court's review.

According to petitioners, the rule of lenity applies because the business nexus element is ambiguous. Petitioners are incorrect, because the plain language of the business nexus element, when read in the context of the entire statute, is not ambiguous. The business nexus element requires that a bribe to a foreign official be made "in order to assist [the company] in obtaining or retaining business for or with * * * any person." 15 U.S.C. 78dd-1(a)(1). The word "business" is ordinarily understood to mean a "commercial or mercantile activity customarily engaged in as a means of livelihood." *Webster's Third New International Dictionary of the English Language* 302 (1993). Thus, the statutory language does not restrict the FCPA's coverage to the award or renewal of contracts, but more broadly reaches actions that assist in obtaining or retaining business. Moreover, the FCPA carves out an exception from its prohibition

for payments for "routine governmental action." 15 U.S.C. 78dd-1(b); see also 15 U.S.C. 78dd-1(f)(3) (defining "routine governmental action"). That exception would be superfluous if the statute were limited in the manner that petitioners propose. Because the plain language of the FCPA covers petitioners' conduct, the rule of lenity has no application here.

To the extent that the statutory text might be said to be ambiguous (see Pet. App. 6a, 12a), any ambiguity can be resolved by the evolution and legislative context of the law. As this Court has made clear, the rule of lenity applies only in "situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute." *Moskal* v. *United States*, 498 U.S. 103, 108 (1990) (quoting *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980)); see *United States* v. *Granderson*, 511 U.S. 39, 54 (1994); *United States* v. *R.L.C.*, 503 U.S. 291, 305-306 (1992) (plurality opinion). And, as the court of appeals noted, the rule is not triggered by the mere fact that the statutory language may be "amenable to more than one reasonable interpretation." Pet. App. 12a, 67a; see *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998). Instead, it "is reserved for cases where, [a]fter seiz[ing] every thing from which aid can be derived, the Court is left with an ambiguous statute." *Smith* v. *United States*, 508 U.S. 223, 239 (1993) (brackets in original) (internal quotation marks omitted).[3]

---

[3] Petitioners suggest (Pet. 31) that "the Court should use this case to decide whether legislative history is *ever* a sufficient basis to construe an otherwise ambiguous criminal statute expansively against a defendant." That issue is not properly presented in this case, because petitioners did not raise it below on either appeal; the court of appeals

Petitioners are therefore incorrect when they assert (Pet. 17-18) that "the question of how much statutory ambiguity is required" to trigger application of the rule of lenity is "plainly unsettled." As petitioners note (Pet. 20-21), this Court stated in *Ladner* v. *United States*, 358 U.S. 169, 178 (1958), that the "policy of lenity means that the Court will not interpret a federal criminal statute [more harshly] * * * when such an interpretation can be based on no more than a guess as to what Congress intended." Although petitioners postulate (Pet. 21) that "that formulation plainly was not intended to be taken literally," this Court has repeatedly held, relying on *Ladner*, that the rule of lenity applies only when there is a "grievous ambiguity" in the statutory text, such that, "after seizing everything from which aid can be derived, . . . [the Court] can make no more than a guess to what Congress intended." *Muscarello*, 524 U.S. at 138-139 (internal quotation marks omitted); see *Holloway* v. *United States*, 526 U.S. 1, 12 n.14 (1999); *United States* v. *Wells*, 519 U.S. 482, 499 (1997); *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995).[4]

---

did not address it; and, as discussed, the text and structure of the statute alone preclude petitioners' proposed interpretation.

[4] Contrary to petitioners' contention (Pet. 25), the court of appeals did not hold "that lenity applies only when all the available tools of statutory construction leave the court entirely at sea regarding the statute's meaning." Rather, the court simply observed that "[t]he rule only applies in situations of ambiguity more extreme than here, where 'after seizing everything from which aid can be derived, [a court] can make no more than a guess as to what Congress intended.'" Pet. App. 15a-16a (second pair of brackets in original) (quoting *Koray*, 515 U.S. at 65). Nor are petitioners correct when they assert that the court of appeals "frankly acknowledged" that, "even *after* considering the legislative history, 'the business nexus standard is ambiguous.'" Pet. 31 (quoting Pet. App. 6a); see *id.* at 8. In fact, the court held that the leg-

There is no merit to petitioners' claim (Pet. 18-19, 26) that the court of appeals' decision is at odds with this Court's decisions in *Crandon* v. *United States*, 494 U.S. 152 (1990); *Hughey* v. *United States*, 495 U.S. 411 (1990); and *Ratzlaf* v. *United States*, 510 U.S. 135 (1994). Contrary to petitioners' reading, none of those cases held "that because the legislative history did not establish that the Government's interpretation was *clearly correct*, lenity compelled reading the statute to favor the defendant." Pet. 26. Indeed, none of the decisions directly turned on the application of the rule of lenity. Rather, they held that legislative history cannot enlarge the scope of a statute beyond its terms where the plain language is *not* ambiguous. See *Crandon*, 494 U.S. at 160; *Hughey*, 495 U.S. at 422; *Ratzlaf*, 510 U.S. at 147 n.17. Those decisions are not relevant here, because the court of appeals did not rely on legislative history to adopt a construction of the statute broader than its plain language. Rather, the court relied on legislative history to support a construction that was "within the fair meaning of the statutory language," which the court considered to be ambiguous.[5] *R.L.C.*, 503 U.S. at 306 n.6; see Pet. App. 67a. And because the statutory language itself was broad enough to support the meaning demonstrated by the legislative history, petitioners were not deprived of fair warning that their conduct was unlawful. See *id.* at 11a.

Petitioners' disagreement with the court of appeals' reading of the legislative history does not warrant fur-

---

islative history of the FCPA clarified any ambiguity in the statutory language. See Pet. App. 17a-18a, 75a.

[5] As noted above, the government does not consider the language to be ambiguous, and no other court of appeals has examined the question.

ther review. See Pet. 27-31. Petitioners assert that "the Government's position receives merely weak support from the legislative history," Pet. 30, and that "[t]he central sources of legislative history * * * are either silent * * * or favor petitioners," Pet. 30-31, but the court of appeals held to the contrary after a thorough review. Pet. App. 67a-90a; see *id.* at 4a (noting prior decision's "rigorous analysis of the FCPA and its legislative history"). Petitioners suggest (Pet. 34) that this case provides an opportunity for the Court to resolve the scope of the FCPA's "obtaining or retaining business" element, but that is not even a question expressly posed by the petition (Pet. i), and the court of appeals' interpretation of the FCPA does not conflict with any decision of any other court of appeals. Instead, petitioners have limited their question presented (Pet. i) to the applicability of the rule of lenity, and that abstract question does not warrant review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General
MATTHEW W. FRIEDRICH
Acting Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

JULY 2008

104

(5)

No. 07-1281

FILED
AUG 6 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

DAVID KAY AND DOUGLAS MURPHY,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
To the U.S. Court of Appeals
For the Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

PAMELA S. KARLAN
JEFFREY L. FISHER
STANFORD SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

REID H. WEINGARTEN
BRUCE C. BISHOP
DAVID M. FRAGALE
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., NW
Washington, DC 20036
Counsel for David Kay

THOMAS C. GOLDSTEIN
(Counsel of Record)
AKIN GUMP STRAUSS
HAUER & FELD, LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

AMY HOWE
KEVIN RUSSELL
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814
Counsel for Douglas Murphy

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR THE PETITIONERS 1

I. The Government Concedes That The First Question Presented Is Certworthy, And There Is No Sound Reason For Further Delaying Its Resolution 1

II. Certiorari Is Warranted To Review The Fifth Circuit's Holding That The Rule Of Lenity Is Inapplicable To The Ambiguous Terms Of The FCPA Because Legislative History Makes It Unnecessary To Literally "Guess" At The Statute's Meaning. 4

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Arthur Andersen L.L.P. v. United States,
544 U.S. 696 (2005) 3

Bifulco v. United States,
447 U.S 381 (1980) 10

Exxon Mobil Corp. v. Allapattah Svcs.,
545 U.S. 546 (2005) 8

Fry v. Pliler,
127 S.Ct. 2321 (2007) 3

Harrington v. California,
395 U.S. 250 (1969) 3

John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank,
510 U.S. 86 (1993) 8

Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Dabit,
547 U.S. 71 (2006) 6

Microsoft Corp. v. AT&T Corp.,
127 S. Ct. 1746 (2007) 3

Morissette v. United States,
342 U.S. 246 (1952) 2

Neder v. United States,
527 U.S. 1 (1999) 1

Rose v. Clark,
478 U.S. 570 (1986) 3

United States v. Davenport,
519 F.3d 940 (9th Cir. 2008) 9

United States v. Granderson,
511 U.S. 39 (1994) 10

United States v. Guidry,
456 F.3d 493 (5th Cir. 2006) 7

United States v. Guzman-Ocampo,
236 F.3d 233 (5th Cir. 2000) 2

United States v. Hasting,
461 U.S. 499 (1983) 3

United States v. Laton,
352 F.3d 286 (6th Cir. 2003) 8

United States v. R.L.C.,
503 U.S. 291 (1992) 7, 8

United States v. Santos,
128 S. Ct. 2020 (2008) 7

Verizon Comm'ns, Inc. v. FCC,
535 U.S. 467 (2002) 7

Statutes

15 U.S.C. § 78dd-1 ..... 4, 5, 6

15 U.S.C. § 78ff(c)(2)(A) 2

Other Authorities

Claudius O. Sokenu, *FCPA Enforcement after* United States v. Kay: *SEC and DOJ Team Up To Increase Consequences of FCPA Violation, in* The Foreign Corrupt Practices Act: Coping with Heightened Enforcement Risks (Lucinda A. Low et al. eds., 2007) 11

Webster's Encyclopedic Unabridged Dictionary (1989) 5

REPLY BRIEF FOR THE PETITIONERS

I. The Government Concedes That The First Question Presented Is Certworthy, And There Is No Sound Reason For Further Delaying Its Resolution.

Though the Government concedes that the first question presented "has divided the courts of appeals and warrants this Court's review in an appropriate case" (BIO 8), it contends that this case does not provide a "suitable . . . vehicle for resolving the question" (*id.* 9) because if petitioners' indictment were very liberally construed, it might adequately allege the willfulness element of an FCPA criminal offense (*id.* 9-12). That was not the theory of the Fifth Circuit and the argument is wrong for three reasons.

First, although the Government contends the Fifth Circuit *could have* found the indictment sufficient by applying a liberal construction rule, there is no dispute that the court of appeals *actually* ruled on harmless error grounds. *See, e.g.*, BIO 12. The Fifth Circuit's focus on the evidence in the indictment reflects a classic application of harmless error analysis, akin to the observation that the trial evidence overwhelmingly supported a finding the jury did not make because of an erroneous charge. *E.g.*, *Neder v. United States*, 527 U.S. 1, 16-17 (1999). Indeed, the court's discussion of "harmless error" (Pet. App. 30a) would make no sense if the court had found no error in the first place.

Contrary to the Government's submission, the court of appeals' view that the indictment alleged facts from which the grand jury *could have* drawn an inference of willfulness provides no ground for find-

ing the indictment sufficient. The Constitution requires the Government to do more than plead evidence from which an element of the offense may be inferred. An indictment must "set forth expressly, fully, and clearly all elements necessary to constitute the offense" (*Morissette v. United States*, 342 U.S. 246, 270 n.30 (1952)), in order to "ensure that the grand jury has found probable cause that the defendant committed each element of the offense" (*United States v. Guzman-Ocampo*, 236 F.3d 233, 236 (5th Cir. 2000) (citation omitted)).

Second, the government's defense of the indictment largely repeats the very error embodied in the indictment's omission. The Government's "liberal construction" theory is that the indictment implicitly alleged such knowledge by describing "quintessentially dishonest conduct." BIO 11. Allegations of dishonest conduct might well suffice to satisfy the FCPA's "corrupt" intent element, which requires proof that the defendant acted with "a bad purpose or evil motive" (Pet. App. 123a (emphasis omitted)). Congress, however, reserved criminal sanctions for those defendants who act not only corruptly, but also willfully—*i.e.*, with the knowledge that their dishonest actions violated the law. 15 U.S.C. § 78ff(c)(2)(A); Pet. App. 130a; BIO 11 n.2. The absence of a willfulness allegation tracks the Government's incorrect position in the district court—abandoned on appeal (U.S. C.A. Br. 21)—that willfulness is *not* an essential element of an FCPA criminal offense, but rather is simply duplicative of the corrupt intent element. To now hold, as the Government suggests, that allegations of corrupt conduct also satisfy the willfulness

requirement would (like the indictment itself) essentially read the willfulness element out of the statute. *Cf. Arthur Andersen L.L.P. v. United States*, 544 U.S. 696, 705-06 (2005) (requiring independent satisfaction of "knowingly" and "corruptly" elements of obstruction of justice statute).

It is no answer to suggest that people should ordinarily assume that dishonest conduct abroad violates *U.S.* law. *See Microsoft Corp. v. AT&T Corp.*, 127 S. Ct. 1746, 1758 (2007) (noting the traditional "presumption that United States law governs domestically but does not rule the world"). The statute criminally punishes anyone who "willfully violates subsection[s]" of the FCPA itself (15 U.S.C. § 78ff(c)(2)(A)), not defendants who willfully violate any "law," foreign or domestic. Thus, nothing in the indictment even suggested, let alone required, that the grand jury determine whether petitioners acted willfully, with the knowledge that their conduct was unlawful.

Third, even setting aside the weakness of the Government's defense of the indictment, the possibility of an alternative ground for affirming a defendant's conviction has not prevented this Court from resolving certworthy harmless error questions in the past. To the contrary, this Court has frequently granted certiorari to decide such issues assuming, without deciding, the existence of error. *See, e.g., Fry v. Pliler*, 127 S.Ct. 2321, 2325 n.1 (2007); *Rose v. Clark*, 478 U.S. 570, 576 n.5 (1986); *United States v. Hasting*, 461 U.S. 499, 506 n.4 (1983). Particularly given the certworthiness of the second question presented, that would be an appropriate course in this case.

II. Certiorari Is Warranted To Review The Fifth Circuit's Holding That The Rule Of Lenity Is Inapplicable To The Ambiguous Terms Of The FCPA Because Legislative History Makes It Unnecessary To Literally "Guess" At The Statute's Meaning.

Petitioners were convicted and sentenced to multi-year prison terms under the FCPA for conduct the criminality of which, the Fifth Circuit conceded, was "ambiguous." Pet. App. 6a. This case presents an ideal vehicle to resolve two vital and recurring questions regarding the rule of lenity: (i) when, if ever, an ambiguous criminal statute can be construed to favor the government on the basis of legislative history; and (ii) whether the rule of lenity functions as nothing more than a tie-breaker, applicable only if a reviewing court is unable to do anything other than literally "guess" at the statute's meaning. The brief in opposition has no persuasive answer to the showing of the petition and two *amicus* briefs that this Court's review of both issues is warranted.

1. The Government's preliminary assertion that the rule of lenity is inapplicable because the FCPA's text is unambiguous lacks merit. The statute makes it a crime for an employee of a U.S. business to willfully and corruptly bribe a foreign official to induce official action that would "assist . . . in obtaining or retaining business for or with . . . any person." 15 U.S.C. §§ 78dd-1(a)(1), -2(a)(1). Although "the government does not consider the language to be ambiguous" (BIO 16 n.5), the seven judges who have considered this case correctly and *unanimously* found that "the statutory language *is* genuinely debatable

and thus ambiguous." Pet. App. 63a; *accord id.* 6a, 113a.

Though the Government's reading is consistent with one broad dictionary definition of "business" (BIO 13), the court of appeals correctly recognized that other common and narrower definitions of "business" render petitioners' conduct perfectly lawful: "[T]he word business can be defined at any point along a continuum from a 'volume of trade,' to 'the purchase and sale of goods in an attempt to make a profit,' to 'an assignment' or a 'project.'" Pet. App. 63a (quoting *Webster's Encyclopedic Unabridged Dictionary* 201 (1989)). The spectrum of potential meanings thus runs from a person who hopes to "improve his business" in terms of seeking to better his general economic performance to one who hopes to "receive the business" of a customer in terms of obtaining a particular relationship or contract. Notably, the limiting phrase, "for or with . . . any person" (15 U.S.C. § 78dd-1(a)(1)(B)) favors the latter interpretation. The statutory text is accordingly ambiguous.

The Fifth Circuit's choice of the broadest, government-favoring interpretation of "business" produced a startlingly sweeping interpretation of this frequently employed provision of federal criminal law—one that criminalizes all payments intended to have *any* positive effect on the company. Under that broad theory, the court of appeals was able to conclude that, because "[a]voiding or lowering taxes reduces operating costs and thus increases profit margins, thereby freeing up funds that the business is otherwise legally obligated to expend" (Pet. App. 74a), such conduct "assist[s] . . . in obtaining or retaining business"

within the meaning of the FCPA. The Government accordingly urges that criminal liability attaches whenever "the resulting savings benefit the company's existing business." BIO 13. The problem is that "[t]he same can be said about virtually any contact with a foreign official that somehow—and no matter how indirectly—enables the company to take some action that reduces costs or otherwise benefits it." Chamber Br. 15.

By contrast, on petitioners' and the district court's reading, the FCPA's business nexus requirement has a significant but nonetheless foreseeable scope. It prohibits bribes intended to secure public or private contracts or to secure permits that, for example, authorize sales in the host country. Pet. App. 112 n.3. The United States, for its part, points to nothing in the text that would justify adopting the former, Government-favoring and business-swallowing reading of the FCPA.[1]

---

[1] The "very limited exceptions" to the FCPA (BIO 5 (quoting Pet. App. 77a)) cited by the Government exempt from liability, for example, payments made to secure expeditious approval of an import permit to which the defendant was entitled, while leaving intact the statute's prohibition against bribes designed to secure a permit to which the defendant had no legal right. This "grease payments" provision actually supports petitioners' reading of the FCPA, as it renders criminal payments made to induce an official "to award new business or to continue business with a particular party" (15 U.S.C. § 78dd-1(f)(3)(B)), a provision that uses the term "business" to refer to particular contractual arrangements, not the payor's general economic health. *See Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 86 (2006) ("identical words used in different parts of the same statute are . . . presumed to have the same meaning" (internal quotation marks omitted)).

2. The United States principally argues—and the Fifth Circuit held—that this case does not implicate the principle of lenity because legislative history supports a broad reading of the FCPA's business nexus requirement. BIO 14. That argument squarely presents a question that this Court has twice reserved and that should be answered in this case: "whether resort to legislative history is ever appropriate when interpreting a criminal statute." *United States v. Santos*, 128 S. Ct. 2020, 2025 n.3 (2008) (plurality opinion) (citing *United States v. R.L.C.*, 503 U.S. 291 (1992)).[2]

The rule of lenity fulfills the "the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly proscribed." *Santos*, 128 S.Ct. at 2025 (plurality opinion). Because the rule "'ensures that criminal statutes will provide fair warning concerning conduct rendered illegal, and because no one can plausibly conclude that a committee report or the floor statements of selected legislators provides such warning,

---

[2] Contrary to the Government's footnoted assertion (BIO 14-15 n.3), that issue is squarely presented by this case. Petitioners relied extensively on the rule of lenity below. Further, the court of appeals expressly "passed upon" the relevance of legislative history (*see* Pet. App. 15a-18a; *Verizon Comm'ns, Inc. v. FCC*, 535 U.S. 467, 530 (2002))), and Fifth Circuit precedent precluded petitioners from arguing anything more than that legislative history should receive very little weight (*see* Pet. C.A. Br. 52-53; Pet. 22 (citing *United States v. Guidry*, 456 F.3d 493, 502 (5th Cir. 2006))). In any event, the Fifth Circuit relied on legislative history during the first appeal in this case–when petitioners' were *appellees*, under no obligation to have anticipated or preserved the argument.

the use of such material seems utterly incompatible with the purposes of the rule or the civilized interests it protects." *United States v. Laton*, 352 F.3d 286, 314 (6th Cir. 2003) (Sutton, J., dissenting); *see also* Pet. 32 & n.6. There is no basis for arguing, let alone assuming, that selective excisions from legislative history put petitioners on fair notice that their commonplace conduct in Haiti constituted a felony under U.S. law.

This case, moreover, starkly illustrates the dangers of construing ambiguous criminal statutes to impose criminal liability on the basis of legislative history. As detailed in the petition (Pet. 4-7, 29-30), the Fifth Circuit merely plucked from the legislative history snippets that supported its conclusion, "looking over a crowd and picking out [its] friends" (*Exxon Mobil Corp. v. Allapattah Svcs.*, 545 U.S. 546, 568 (2005)), while according no weight to strong legislative evidence to the contrary. Of particular note, Congress addressed the business nexus standard on three separate occasions—at the time of the statute's initial enactment, and in two subsequent amendments—and in *each instance* it declined to enact language that would have expressly criminalized petitioners' conduct. Pet. 28-29; *see also* Pet. App. 114a-20a. Especially in criminal cases, statutes should not be construed expansively based on "the discarded draft[s]" of legislation. *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 101 (1993); *see also* Pet. 28 (citing cases).

Nor can review be delayed due to the absence of a direct conflict in the circuits. No court of appeals can currently depart from this Court's approval of some

use of legislative history in construing criminal statutes (*see United States v. R.L.C.*, 503 U.S. 291, 298-99, 305-06 (1992) (plurality opinion)) and create a circuit conflict. Only this Court can resolve the question it has twice before reserved to clarify the independent role of legislative history (if any) in providing fair notice of criminal liability.

3. Certiorari is also warranted to resolve the existing circuit conflict—which the Governmental notably does *not* deny—over whether the rule of lenity applies when a criminal statute is ambiguous or only when its meaning is truly indeterminate such that a court can only "guess" at its meaning. The Fifth and Tenth Circuits strictly limit the lenity principle to the minuscule class of cases in which it is *literally* only possible to "guess" at a criminal statute's meaning. *See* Pet. 21-22. Thus, the Fifth Circuit held that the FCPA's ambiguity was insufficiently "extreme" to trigger lenity (Pet. App. 15a), because that court deems lenity "a last resort of interpretation" (*id.*) applicable only when all the tools of statutory construction leave the court no choice but to engage in "guesswork" regarding Congress's intent (*id.* 16a). By contrast, a well-settled body of precedents in other circuits squarely rejects the view that lenity is no more than a tie-breaker, holding instead that criminal statutes must be construed to favor defendants unless the government's construction is unambiguously correct. Under that rule, legislative history will rarely if ever provide the required clarity. *See* Pet. 22-25 (highlighting lines of authority in D.C. and Ninth Circuits); *see also United States v. Davenport*, 519 F.3d 940, 947 (9th Cir. 2008).

The better reading of this Court's precedents is that lenity requires resolving uncertainty in favor of the defendant, unless the statute unambiguously supports the government's interpretation. Although the United States invokes decisions employing the "no more than a guess" formulation (BIO 15), it fails to account for the petition's detailed showing that (contrary to the ruling below) those precedents did not intend that terminology to be taken literally, but in fact continue to adhere to the settled principles that lenity applies unless "the Government's position is unambiguously correct" (*United States v. Granderson*, 511 U.S. 39, 54 (1994)) and that, if "doubts remain, they must be resolved in accord with the rule of lenity" (*Bifulco v. United States*, 447 U.S 381, 400 (1980)). *See* Pet. 20-21. Certiorari is warranted because only this Court can resolve the inconsistency in its own precedents and bring uniformity to the decisions of the courts of appeals.

4. Finally, the brief of the U.S. Chamber of Commerce amply demonstrates that this Court's intervention is warranted because of the sweeping repercussions of the Fifth Circuit's ruling for businesses and the frequent recurrence of the question presented. *See also* Pet. 33-34. The Fifth Circuit's decision in this case marks a watershed expansion of FCPA enforcement. "In the wake of [the Fifth Circuit's decision in] *Kay*, there have been numerous FCPA actions predicated in part or in whole on payments made to reduce or avoid regulatory burdens, and many additional cases remain under investigation." Chamber Br. 18. The interpretation of the FCPA adopted below "transform[ed] what would be a

relatively minor violation under local law into potentially enterprise-threatening U.S. criminal liability" (Chamber Br. 2), and in so doing "greatly exacerbated compliance and investigative costs" (*id.* 20) and allowed the government "to force 'increasingly onerous settlements that companies are compelled to accept'" (*id.* 23 (quoting Claudius O. Sokenu, *FCPA Enforcement after* United States v. Kay: *SEC and DOJ Team Up To Increase Consequences of FCPA Violation*, *in* The Foreign Corrupt Practices Act: Coping with Heightened Enforcement Risks (Lucinda A. Low et al. eds., 2007))). Because of the paralyzing costs now entailed in disputing the admittedly ambiguous scope of the business-nexus requirement, *see* Chamber Br. 13-15, this Court's prompt intervention is warranted. Otherwise, businesses will have little choice but to bend to the tremendous pressure to settle such charges, thereby leaving little opportunity for clarification of the law in other circuits. *Id.* 16-17, 21-23.

The petition for certiorari should accordingly be granted. In addition, the Court may wish to consider granting the petition together with No. 08-108, *Flores-Figueroa v. United States*, or No. 08-5316, *Mendoza-Gonzalez v. United States*. Those petitions present the question whether an element of the crime of aggravated identity theft (18 U.S.C. § 1028A(a)(1)) is that the defendant knew the identification he used belonged to another person. The acknowledged circuit conflict over that question turns substantially on the circumstances warranting application of the rule of lenity (*see* Pet. for Cert., No. 08-108, at 10, 21, 27-28), and the cases together accordingly present this

Court with a unique opportunity to consider the application of the lenity principle in multiple contexts and to bring much needed clarity to this basic and frequently recurring issue. *See also* Pet. 24 (citing D.C. Circuit's ruling on aggravated identity theft question as exemplifying conflict over proper application of lenity)

CONCLUSION

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PAMELA S. KARLAN
JEFFREY L. FISHER
STANFORD SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

REID H. WEINGARTEN
BRUCE C. BISHOP
DAVID M. FRAGALE
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., NW
Washington, DC 20036
Counsel for David Kay

THOMAS C. GOLDSTEIN
(Counsel of Record)
AKIN GUMP STRAUSS
HAUER & FELD, LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000

AMY HOWE
KEVIN RUSSELL
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814

Counsel for Douglas Murphy

93

(2)

No. 07-1281

FILED
MAY 12 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

DAVID KAY AND DOUGLAS MURPHY,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H STREET, N.W.
WASHINGTON, D.C. 20062
(202) 463-5337

J. SCOTT BALLENGER
Counsel of Record
DOUGLAS N. GREENBURG
NATHAN H. SELTZER
LATHAM & WATKINS LLP
555 11TH STREET, N.W.
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

ARGUMENT 3

I. THE FIFTH CIRCUIT'S APPROACH TO THE RULE OF LENITY IS DEEPLY FLAWED AND MERITS REVIEW 3

A. The Rule Of Lenity Requires That The Fifth Circuit's Interpretation Of The FCPA In This Case Must Be Rejected 3

B. The Rule Of Lenity Is Crucially Important To The Fair And Orderly Administration Of Justice 9

II. THE PROPER INTERPRETATION OF THE FCPA'S BUSINESS NEXUS REQUIREMENT PRESENTS AN ISSUE OF NATIONAL IMPORTANCE 13

A. The Fifth Circuit's Decision Has Substantially Increased FCPA Compliance Costs 13

B. The Fifth Circuit's Decision Has Directly Resulted In Expansive Enforcement By The Government 16

TABLE OF CONTENTS—Continued

Page

C. The Business Community Needs This Court's Guidance 21

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES

Almendarez-Torres v. United States,
523 U.S. 224 (1998) 10

Bailey v. United States,
516 U.S. 137 (1995) 11

Bousley v. United States,
523 U.S. 614 (1998) 11, 12

Bryan v. United States,
524 U.S. 184 (1998) 11

Chickasaw Nation v. United States,
534 U.S. 84 (2001) 8

Clark v. Martinez,
543 U.S. 371 (2005) 10

Exxon Mobil Corp. v. Allapattah Services, Inc.,
545 U.S. 546 (2005) 8

Hughey v. United States,
495 U.S. 411 (1990) 7

Ladner v. United States,
358 U.S. 169 (1958) 6

McNally v. United States,
483 U.S. 350 (1987) 5

TABLE OF AUTHORITIES—Continued

Page(s)

Moskal v. United States,
498 U.S. 103 (1990) 7

Red Lion Broadcasting Co. v. FCC,
395 U.S. 367 (1969) 4, 9

Reno v. Koray,
515 U.S. 50 (1995) 5

United States v. Barnes,
295 F.3d 1354 (D.C. Cir. 2002) 10

United States v. Bass,
404 U.S. 336 (1971) 9, 11

United States v. Castle,
925 F.2d 831 (5th Cir. 1991) 15

United States v. Granderson,
511 U.S. 39 (1994) 6

United States v. Hudson & Goodwin,
11 U.S. (7 Cranch) 32 (1812) 10

United States v. Lacher,
134 U.S. 624 (1890) 5

United States v. Laton,
352 F.3d 286 (6th Cir. 2003), *cert. denied*,
542 U.S. 937 (2004) 5, 7

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. Liebo,
923 F.2d 1308 (8th Cir. 1991) 15

United States v. Wiltberger,
18 U.S. (5 Wheat.) 76 (1820) 5

United States v. Young & Rubicam, Inc.,
741 F. Supp. 334 (D. Conn. 1990) 15

STATUTES

15 U.S.C. § 78dd-1(f)(2) 21

15 U.S.C. § 78dd-2(a)(1) 15

LEGISLATIVE MATERIALS

Business Accounting and Foreign Trade Simplification Act: Joint Hearings on S. 708 Before the Subcommittee on Securities and the Subcommittee on International Finance & Monetary Policy of the Committee on Banking, Housing and Urban Affairs, 97th Cong. (1981) 22

TABLE OF AUTHORITIES—Continued

Page(s)

Business Accounting and Foreign Trade Simplification Act: Joint Hearing on S. 430 Before the Subcommittee on International Finance & Monetary Policy and the Subcommittee on Securities of the Committee on Banking, Housing, and Urban Affairs, 99th Cong. (1986) 22

S. 305, 95th Cong. § 103 (1977) 19

S. Rep. No. 97-209 (1981) 22

OTHER AUTHORITY

Jack Ewing, *Siemens Braces for a Slap from Uncle Sam*, BusinessWeek, Nov. 26, 2007 14

John Gibeaut, *Battling Bribery Abroad*, ABA Journal (Mar. 2007) 17

Tom Leander, *In China, You Better Watch Out*, CFO Asia (Mar. 20, 2006) 14

Lucinda A. Low et al., *Enforcement of the FCPA in the United States: Trends and the Effects of International Standards*, *reprinted in* The Foreign Corrupt Practices Act: Coping with Heightened Enforcement Risks (Lucinda A. Low et al. eds., 2007) 14, 16, 17, 23

TABLE OF AUTHORITIES—Continued

Page(s)

Steven Pearlstein, *Cashing In on Corruption*, The Washington Post, Apr. 25, 2008 14

Claudius O. Sokenu, *FCPA Enforcement After* United States v. Kay: *SEC and DOJ Team Up To Increase Consequences of FCPA Violation*, *reprinted in* The Foreign Corrupt Practices Act: Coping with Heightened Enforcement Risks (Lucinda A. Low et al. eds., 2007).....14, 16, 23

Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195 (1983).....8

Donald Zarin, *Introduction* to *The FCPA in 2008: Not the Statute You May Have Thought It Was*, *reprinted in* The Foreign Corrupt Practices Act 2008: Coping with Heightened Enforcement Risks (Lucinda A. Low et al. eds., 2008).....22

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation, representing an underlying membership of more than three million companies and professional organizations of all sizes and in all industries.[1] The Chamber advocates the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

This case addresses the "business nexus" element of the Foreign Corrupt Practices Act ("FCPA"). The FCPA is an extraordinary piece of extraterritorial legislation, representing a laudable moral commitment by the United States to police and prosecute certain bribes paid to foreign government officials. But the FCPA was never meant to transform every public corruption issue, worldwide, into a crime under U.S. law. It applies only to payments made for the purpose of "obtaining or retaining business." The Fifth Circuit's two decisions in this case essentially nullify that requirement, vastly expanding the substantive scope of the FCPA to payments that have absolutely no direct connection to "obtaining or retaining business." This case merits review by this Court, for at least two reasons.

---

[1] Pursuant to this Court's Rule 37, *amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties were timely notified 10 days prior to filing and have consented to the filing of this brief. Letters of consent have been filed with the Clerk.

First, the Fifth Circuit's decision, and the expansive enforcement efforts it has spawned, threaten American executives with prison for conduct not criminalized by the plain language of the statute. The Fifth Circuit's refusal to apply the rule of lenity in this case—despite concluding that the Act was ambiguous even *after* considering legislative history—essentially nullifies that vital and historic canon of construction. The rule of lenity is essential to the fair and orderly administration of justice. The Fifth Circuit's dismissive treatment of the rule is grounded in a misinterpretation of this Court's recent cases that only this Court can correct. As the petition explains, there is an active circuit split on this issue that merits review.

Second, the proper interpretation of the FCPA's business nexus requirement concerns the fundamental scope of one of the most important American laws governing the conduct of business overseas, and presents an issue of national and international importance. As the pace of globalization increases, many of the Chamber's members compete vigorously for business overseas and in emerging markets, and are governed by the FCPA. The Chamber and its members certainly do not condone the paying of bribes, anywhere or for any purpose, and work hard to comply with local anti-corruption laws everywhere that they do business. But the FCPA can often transform what would be a relatively minor violation under local law into potentially enterprise-threatening U.S. criminal liability. Setting aside the risk of criminal liability itself, FCPA investigations and compliance efforts are extraordinarily expensive and disruptive, frequently involving the need for large teams of U.S. lawyers and

forensic investigators to interview witnesses, review documentary evidence, and analyze financial transactions on the far side of the world, and in unfamiliar languages. The Fifth Circuit's decision in this case broadens the FCPA's substantive coverage from interactions with foreign officials for the purpose of obtaining or retaining business, to essentially any interaction with a foreign official on any subject, however trivial—and hence greatly increases the investigative and compliance burden on U.S. businesses without any clear direction from Congress. The Chamber therefore urges this Court to grant certiorari to provide members of the business community with clear guidance on their potential exposure to FCPA liability and to clarify the proper boundaries of the FCPA.

ARGUMENT

I. THE FIFTH CIRCUIT'S APPROACH TO THE RULE OF LENITY IS DEEPLY FLAWED AND MERITS REVIEW

A. The Rule Of Lenity Requires That The Fifth Circuit's Interpretation Of The FCPA In This Case Must Be Rejected

The Fifth Circuit repeatedly acknowledged that the FCPA's "obtaining or retaining business" language is "'amenable to more than one reasonable interpretation' and therefore 'ambiguous as a matter of law' absent its legislative history." Pet. App. 12a (footnote and citation omitted); *see also id.* at 63a ("genuinely debatable and thus ambiguous"). It acknowledged that the direct legislative history—the Conference Report—"merely parrots the statutory language" and sheds no additional light. *Id.* at 70a. The Fifth Circuit also recognized that Congress rejected more broadly

drafted language from the House bill that would have eliminated any business nexus requirement (making it unlawful to bribe a foreign official "to use his or her influence to affect any act or decision") in favor of the narrower Senate version ultimately enacted. *id.* at 68a.

The court nonetheless resolved the acknowledged ambiguity in this criminal statute in *the government's* favor, for several unpersuasive reasons. Despite finding no support in the text, and acknowledging that Congress rejected the text that would have specifically covered the conduct in this case, the Fifth Circuit concluded (without citation) that the Senate was nevertheless "*mindful* of bribes that influence legislative or regulatory actions." *Id.* at 72a (emphasis added). It reasoned that "the concern of Congress with the immorality, inefficiency, and unethical character of bribery presumably does not vanish simply because the tainted payments are intended to secure a favorable decision less significant than winning a contract bid." *Id.* at 74a. And it relied on a Conference Report from the 1988 amendments to the FCPA declaring that "a payment to a foreign official for the purpose of obtaining more favorable tax treatment" was already covered by the Act. *Id.* at 79-80a. The court defended this obviously improper reliance on subsequent *legislative history* by invoking this Court's statement in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969), that "' [s]ubsequent *legislation* declaring the intent of an earlier statute is entitled to great weight in statutory construction.'" Pet. App. 80a-81a (emphasis added).

The Fifth Circuit also declined to apply the rule of lenity, which it characterized as a "last resort of interpretation" that applies only where "'after seizing

everything from which aid can be derived, [a court] can make no more than a guess as to what Congress intended.'" *Id.* at 15a-16a (quoting *Reno v. Koray*, 515 U.S. 50, 65 (1995)). The Fifth Circuit's approach to the construction of a concededly ambiguous criminal statute, for which not even the legislative history supplies any clear guidance, is plainly improper. The rule of lenity requires that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987). As Chief Justice Marshall explained in *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820), when addressing another question of ambiguity in the extraterritorial application of U.S. law,

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.

The principle is that "before a man can be punished, his case must be plainly and unmistakably within the statute." *United States v. Lacher*, 134 U.S. 624, 628 (1890); *see also United States v. Laton*, 352 F.3d 286, 314 (6th Cir. 2003) (Sutton, J., dissenting) ("I am aware of no decision from our Court or from the United States Supreme Court that *broadens* the reach of a criminal statute on the basis of legislative history ...."), *cert. denied*, 542 U.S. 937 (2004).

The Fifth Circuit's articulation of the rule of lenity as a "last resort of interpretation" fundamentally misunderstands the purposes and role of the rule. Properly understood, lenity is a primary canon of construction in its own right. The Fifth Circuit's approach strips one of the most venerable and significant presumptions in the law of any significance whatsoever.

The Fifth Circuit's fundamental error was in failing to appreciate that lenity applies whenever a statute remains ambiguous—*i.e.*, reasonably susceptible to more than one interpretation—after resort to the conventional core tools of statutory construction. The Fifth Circuit invoked stray language from this Court's opinion in *Koray* to suggest that lenity instead only comes into play when a court "'can make no more than a guess as to what Congress intended.'" Pet. App. 15a-16a (citations omitted). As the petition explains, however, the "no more than a guess" phrase entered the law in decisions of this Court *applying* the lenity principle, not rejecting it. *See, e.g., Ladner v. United States*, 358 U.S. 169, 178 (1958). It was never intended to permit a court to resolve statutory ambiguity against a criminal defendant whenever it could do so without resorting to sheer speculation. The test has always been that "where text, structure, and history fail to establish that the Government's position is unambiguously correct[,] we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor." *United States v. Granderson*, 511 U.S. 39, 54 (1994).

The Fifth Circuit forthrightly conceded that the FCPA's business nexus requirement remains ambiguous even after mining all possible inferences from the text and structure of the statute. The court of

appeals resolved that ambiguity in the government's favor by relying on a vague witches' brew of considerations, dominated by the court's intuition (not grounded in any particular language) about Congress's overall preferences, and several sources that might loosely be described as legislative history. It focused on a prior SEC report that the court believed provided some of the impetus for the FCPA's passage, and a Conference Report from a subsequent Congress purporting to interpret what the earlier Congress meant when it enacted the FCPA.

This Court's opinions have reflected different views about whether a statutory ambiguity in a criminal statute may ever be resolved in the government's favor through resort to legislative history. *Compare, e.g., Moskal v. United States*, 498 U.S. 103, 108 (1990) (applying lenity only to "situations in which a reasonable doubt persists about a statute's intended scope even after resort to 'the language and structure, legislative history, and motivating policies' of the statute") (citation omitted), *with Hughey v. United States*, 495 U.S. 411, 422 (1990) ("[L]ongstanding principles of lenity ... preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history."). There is much to be said for a rule that, although all citizens are presumed to know the text of the law and relevant interpretive judicial decisions, they are not presumed or required to study congressional reports, floor statements by individual congressmen, or similar forms of legislative history. *E.g., Laton*, 352 F.3d at 314 (Sutton, J., dissenting) (stating that a contrary rule "stretches the necessary legal fiction that every person knows the law to the

breaking point") (citation omitted). Such statements are at best tangential to the legislative and interpretive process, and can frequently be found to express contradictory sentiments such that "[j]udicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in 'looking over a crowd and picking out your friends.'" *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 567 (2005) (citing Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983)). This case presents an especially egregious example of the use of legislative history.

Moreover, the materials the Fifth Circuit relied upon do not even genuinely merit the label of "legislative history." The Fifth Circuit conceded that the actual legislative history of the FCPA's business nexus provision is entirely uninformative. If anything, Congress's rejection of the broader House version of the language counsels strongly *against* the government's interpretation. *See, e.g., Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001) ("We ordinarily will not assume that Congress intended 'to enact statutory language that it has earlier discarded in favor of other language.'") (citation omitted). The Fifth Circuit relied on an SEC report expressing that agency's views *prior* to passage of the FCPA, but that document is not legislative history in any conventional sense. It may have been part of the background informing Congress about the need for some legislative action in this area, but it obviously sheds no light on why, for example, Congress ultimately chose the narrower Senate language rather than the broader House bill (which would have been more clearly

consonant with the views previously expressed by the SEC). And the Fifth Circuit's reliance on *subsequent legislative history* from a later Congress is obviously illegitimate. As the petition explains, the Fifth Circuit completely misunderstood the *Red Lion* principle—which gives great weight to subsequent interpretive *legislation*, not to subsequent legislative history. *Red Lion*, 395 U.S. at 380-81. This Court continues to engage in a spirited debate about the general relevance of legislative history to statutory interpretation, but agrees unanimously that subsequent legislative history of the sort relied upon by the Fifth Circuit is essentially useless and should be wholly disregarded.

Although it may be possible to develop various opinions about the proper scope of the business nexus provision without resorting to sheer guesswork, there is no serious dispute that the conventional tools of statutory interpretation—including legislative history, correctly conceived—leave this statute ambiguous. This case therefore should have been resolved by the historic principle that ambiguities in criminal statutes are always resolved against the government.

B. The Rule Of Lenity Is Crucially Important To The Fair And Orderly Administration Of Justice

The administration of justice would benefit greatly from an opinion by this Court refocusing the lower courts on the importance of the rule of lenity.

First, the rule of lenity is an important corollary of the due process principle that "'fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.'" *United States v.*

Bass, 404 U.S. 336, 348 (1971) (citation omitted). Neither the punitive nor the deterrent purposes of the criminal law are sensibly served by punishing persons who reasonably believed that they were conforming their conduct to the requirements of the law. *E.g.*, *United States v. Barnes*, 295 F.3d 1354, 1370 (D.C. Cir. 2002) (Sentelle, J., dissenting) ("That a snippet of legislative history is more consistent with the less lenient application of a criminal statute hardly erodes the laudable principles of the rule of lenity. This proposition seems to me quite offensive to our historic sense of fairness in criminal law, indeed, perhaps to the Due Process Clause.").

Second, the rule of lenity minimizes hard questions of fair notice by construing criminal statutes narrowly and resolving ambiguities against the government. In that sense, lenity operates like a special-purpose application of the general doctrine of constitutional doubt by avoiding the need for courts to resolve difficult due process questions. *See, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (discussing lenity and constitutional doubt together); *Almendarez-Torres v. United States*, 523 U.S. 224, 270 (1998) (Scalia, J., dissenting) (noting that "the doctrine of constitutional doubt comes into play when the statute is 'susceptible of' the problem-avoiding interpretation, ... when that interpretation is *reasonable*, though not necessarily the best").

Third, this Court has long recognized that the rule of lenity plays an important role in protecting legislative prerogatives in the definition of crimes and the evolution of the criminal law. There has never been any federal common law of crimes, *see United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812), and

the rule of lenity serves to ensure that in the criminal context judges do not engage even in interstitial "interpretive" lawmaking. The substantive scope of the criminal law is so important that it should be vested, exclusively, in the elected and accountable branches of government. "[B]ecause criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *Bass*, 404 U.S. at 348.

Finally, rigorous application of the rule of lenity will minimize circuit splits over the substantive scope of criminal statutes. As Justice Scalia has observed:

> In our era of multiplying new federal crimes, there is more reason than ever to give this ancient canon of construction [the rule of lenity] consistent application: by fostering unanimity in the interpretation of criminal statutes, it will reduce the occasions on which this Court will have to produce judicial havoc by resolving in defendants' favor a Circuit conflict regarding the substantive elements of a federal crime.

Bryan v. United States, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting).

In *Bousley v. United States*, 523 U.S. 614 (1998), for example, this Court had to sort through a jurisprudential quagmire produced by its earlier decision in *Bailey v. United States*, 516 U.S. 137 (1995). *Bailey* had resolved a circuit split over the interpretation of a federal crime in a manner more favorable to defendants. Numerous habeas petitions were soon filed in the previously pro-government circuits by defendants arguing that they would have been factually innocent under the interpretation of the statute that this Court adopted in *Bailey*. This Court

ultimately held that persons convicted under the incorrect pro-government interpretations of the statute were entitled to *habeas* relief if they could show "actual innocence" under the interpretation adopted in *Bailey*. *See Bousley*, 523 U.S. at 623-24. But because, as a practical matter, claims of "actual innocence" were easy to make and hard to disprove without a hearing, the final practical result of the *Bailey* circuit split was that many of the defendants convicted in the circuits initially adopting the harsher (pro-government) interpretation of the statute ultimately gained a right to re-litigate their convictions in an evidentiary hearing on federal *habeas corpus* review.

The collateral fallout from this Court's decisions in *Bailey* and *Bousley* was a great burden for the federal district courts and the general administration of justice. Similar juridical chaos can be expected going forward whenever this Court resolves a circuit split about the substantive interpretation of a criminal statute. And it is all largely unnecessary, because if the rule of lenity is properly and consistently applied, circuit splits over the substantive interpretation of criminal statutes should be exceedingly rare. By granting review in this case and forcefully restating the importance of the rule of lenity, this Court can help forestall future unnecessary circuit splits and ensure that the vexing retroactivity and *habeas* problems encountered in *Bousley* do not again choke the federal docket.

II. THE PROPER INTERPRETATION OF THE FCPA'S BUSINESS NEXUS REQUIREMENT PRESENTS AN ISSUE OF NATIONAL IMPORTANCE

The Chamber and its members are not advocating for any right to pay bribes overseas when those bribes do not relate to obtaining or retaining business. Even without an unjustifiable extension of the FCPA, U.S. businesses seek to comply with local anti-corruption laws in all of their activities. Indeed, U.S. businesses increasingly are adopting global anti-corruption policies that require compliance with the FCPA *and* local anti-corruption laws. Nonetheless, the Fifth Circuit's expansive interpretation of the FCPA merits review for several reasons.

A. The Fifth Circuit's Decision Has Substantially Increased FCPA Compliance Costs

In order to avoid the risk of enterprise-threatening criminal liability, a U.S. company must be extremely vigilant about any interaction potentially subject to the FCPA. It may, for example, need to require multiple internal reviews and approvals, scrupulously document and retain the evidence of legitimate payments to "facilitat[e] or expedit[e] ... routine governmental action," and devote substantial resources to vetting and monitoring third-party representatives (or refrain from delegating FCPA-covered interactions at all). And when it learns that conduct has occurred that may have violated the FCPA, a prudent U.S. company must pursue an internal investigation.

Those investigations are often extraordinarily expensive, because of their complexity and the need for U.S. lawyers and financial investigators to operate in

unfamiliar countries and languages. Comprehensive internal investigations often range from $1 million to $20 million. *See* Steven Pearlstein, *Cashing In on Corruption*, The Washington Post, Apr. 25, 2008, at D1. As of November 2007, in the midst of a long running investigation, electronics company Siemens disclosed that it has already spent $500 million on its internal investigation overseen by Debevoise & Plimpton. *See* Jack Ewing, *Siemens Braces for a Slap from Uncle Sam*, BusinessWeek, Nov. 26, 2007, at 78. ABB settled a case with the government for $16.4 million in fines and penalties, but the investigation and continued monitoring will cost more. ABB, a Swiss-Swedish engineering group, reported paying for 43,000 hours of lawyers' time and, as part of the settlement with the SEC, must hire a compliance monitor to oversee its operations. Tom Leander, *In China, You Better Watch Out*, CFO Asia (Mar. 20, 2006). Such costly "[c]ompliance monitors with three-year mandates have become a common feature of recent enforcement actions." Lucinda A. Low et al., *Enforcement of the FCPA in the United States: Trends and the Effects of International Standards*, *reprinted in* The Foreign Corrupt Practices Act: Coping with Heightened Enforcement Risks 93 (Lucinda A. Low et al. eds., 2007) ("Heightened Enforcement Risks"). In fact, nearly "every settled case since the Fifth Circuit's decision in *Kay* has included an agreement by the settling company to retain an independent consultant acceptable to the SEC and DOJ to evaluate the settling company's compliance with the FCPA." Claudius O. Sokenu, *FCPA Enforcement After* United States v. Kay: *SEC and DOJ Team Up To Increase Consequences of FCPA Violation*, *reprinted in* Heightened Enforcement Risks at 132. And those

direct costs do not account for the disruptive costs to the business's operations or other compliance priorities.

Safeguards and expenses like these are within what Congress contemplated when a U.S. company is attempting to obtain or retain business from or directed by a foreign government. In such contexts, the core purposes of the FCPA are implicated and companies are on clear notice of the need for heightened vigilance. Before this prosecution, the vast majority of federal criminal enforcement of the FCPA had been in the context of payments to obtain or renew contracts, consistent with the statutory prohibition on illicit payments "to assist such [business] in obtaining or retaining business for or with ... any person." 15 U.S.C. § 78dd-2(a)(1). *See, e.g., United States v. Liebo*, 923 F.2d 1308, 1311-12 (8th Cir. 1991); *United States v. Castle*, 925 F.2d 831, 832-33 (5th Cir. 1991) (per curiam); *United States v. Young & Rubicam, Inc.*, 741 F. Supp. 334, 344 (D. Conn. 1990).

The Fifth Circuit's reasoning in this case vastly increases the compliance burdens and costs on U.S. companies by greatly expanding the scope of the interactions potentially subject to criminal liability under U.S. law. The court held that "[a]voiding or lowering taxes reduces operating costs and thus increases profit margins, thereby freeing up funds that the business is otherwise legally obligated to expend. And this, in turn, enables it to take any number of actions to the disadvantage of competitors." Pet. App. 74a. The same can be said about virtually any contact with a foreign official that somehow—and no matter how indirectly—enables the company to take some action that reduces costs or otherwise benefits it.

Thus, for example, even small illicit payments by a third-party customs agent somewhere become a potential criminal violation of U.S. law, with a host of potential consequences for the U.S. company that retained the local agent that far exceed the significance of the offense in the jurisdiction where the conduct occurred.

B. The Fifth Circuit's Decision Has Directly Resulted In Expansive Enforcement By The Government

The Fifth Circuit's substantive expansion of the FCPA has had a dramatic impact on U.S. enforcement activities. "Since the Fifth Circuit's decision in February 2004, the SEC and DOJ have intensified their respective FCPA enforcement programs." Sokenu, *supra*, at 142; *see also* Low, *supra* at 67. Although *Kay* at least required the government to prove at trial some connection between the illicit conduct and obtaining or retaining business, this standard in practice leads to investigations of *any* potential payment to government officials no matter how attenuated the business nexus. Indeed, many of the post-*Kay* investigations and prosecutions have relied on the *Kay* reasoning to target allegedly illicit payments that have little if anything to do with obtaining or retaining business. As one commentator put it:

> U.S. companies ... face an ever-expanding interpretation of the FCPA by the enforcement agencies—the Justice Department on the criminal side and the Securities Exchange Commission at the civil end.
>
> The agencies operate largely unconstrained by judicial precedent: Staying in business is more

> important than setting precedent to most companies, so they typically plead guilty or settle with the government rather than risk the potentially ruinous consequences of going to trial.
>
> The dearth of case law and widening intolerance of bribery can turn compliance into an international game of pin the tail on the donkey.

John Gibeaut, *Battling Bribery Abroad,* ABA Journal 50 (Mar. 2007).

One area on which the government has focused intensely since *Kay* involves payments to reduce or avoid regulatory burdens. American businesses face substantial regulatory and operational burdens abroad.

> The ability of a company to operate in a host country ... and the success of those operations, often turns on discretionary government decisions, including foreign investment or trade approvals; the obtaining of concessions (as in the natural resources sector), franchises, permits, or licenses (as in the telecommunications sector in many countries or in other 'sensitive' sectors), tax or customs rulings, and other regulatory actions or benefits. As a condition to trade or investment transactions, the government may require the foreign investor to partner with a local firm, subcontract certain work to local firms, meet specified local employment standards, build infrastructure, or satisfy other performance conditions.

Low, *supra* at 72.

While the FCPA contains an express safe harbor for so-called "facilitating payments" or "grease payments" necessary to induce a foreign official simply

to do his or her job, the line between a legitimate facilitating payment and a forbidden bribe is often murky at best. For example, the payments to local officials or law enforcement that the DOJ and SEC can potentially target in the wake of *Kay* are often necessary to protect a company's property or construction equipment from theft, to permit a company's ships to enter port without harassment, or to obtain necessary permits, licenses, or zoning rules to even begin operations in a country. A U.S. company may ultimately be seeking nothing more than protection of private property and the rule of law, but there is always a risk that U.S. prosecutors will attempt to recharacterize such payments as an illicit effort to influence local regulatory or enforcement discretion in a manner that confers, under the Fifth Circuit's broad understanding, some business advantage.

In the wake of *Kay*, there have been numerous FCPA actions predicated in part or in whole on payments made to reduce or avoid regulatory burdens, and many additional cases remain under investigation. Among others, the DOJ and SEC have entered into resolutions with companies alleged to have paid bribes to obtain (1) government inspection reports and laboratory certifications;[2] (2) reductions in annual employment tax obligations;[3] (3) reductions in general

---

[2] *See SEC v. Delta & Pine Land Co.*, No. 07-cv-01352 (D.D.C. filed July 25, 2007); *In the Matter of Delta & Pine Land Co.*, SEC Admin. Proceeding File No. 3-12712, Cease & Desist Order at 3 (July 26, 2007), *available at* http://www.sec.gov/litigation/admin/2007/34-56138.pdf

[3] *In the Matter of Bristow Group Inc.*, SEC Admin. Proceeding File No. 3-12833, Cease & Desist Order at 3 (Sept. 26, 2007),

tax obligations;[4] (4) refunds on previous tax payments;[5] (5) customs clearance for goods or equipment that were improperly or illegally imported;[6] (6) customs clearance for goods delayed due to the failure to post bonds with sufficient funds to cover duties and tariffs;[7] (7) encourage the repeal or amendment of national regulations limiting foreign investments;[8] (8) repeal of a government decree requiring an environmental

---

available at http://www.sec.gov/litigation/admin/2007/34-5633.pdf; Press Release, *SEC Institutes Settled Enforcement Action Against Bristow Group for Improper Payment to Nigerian Gov't Officials and Other Violations* (Sept. 26, 2007), *available at* http://www.sec.gov/news/press/2007/2007-201.htm.

[4] *In the Matter of Baker Hughes Inc.*, SEC Admin. Proceeding File No. 3-10572, Cease & Desist Order (Sept. 12, 2001), *available at* http://www.sec.gov/litigation/admin/34-44784.htm; *SEC v. KPMG Siddharta Siddharta & Harsono*, No. H-01-3105 (S.D. Tex. filed Sept. 11, 2001); *SEC v. Mattson*, No. H-01-3106 (S.D. Tex. filed Sept. 11, 2001).

[5] *SEC v. Triton Energy Corp.*, No. 97-cv-00401-RMU (D.D.C. filed Feb. 27, 1997).

[6] *In the Matter of BJ Servs. Co.*, SEC Admin. Proceeding File No. 3-11427, Cease & Desist Order (Mar. 10, 2004), *available at* http://www.gov/litigation/admin/34-49390.htm.

[7] *United States v. Vetco Gray Controls Inc.*, No. 07-cr-004 (S.D. Tex. filed Jan. 5, 2007).

[8] *SEC v. BellSouth Corp.*, No. 02-cv-00113-ODE (N.D. Ga. filed Jan. 15, 2002). It is worth noting that the Senate originally proposed language that would have prohibited payments made for the purpose of "obtaining or retaining business ... or directing business to, any person or *influencing legislation or regulations* of [the foreign] government." S. 305, 95th Cong. § 103 (1977) (emphasis added). This language was ultimately rejected in favor of the current statute.

impact study to be conducted;[9] (9) expedited government registration certifications required by law to produce, warehouse, or market products in the country;[10] and (10) beneficial changes to laws and regulations relating to land development.[11] Additional ongoing investigations implicate payments to bribe tax, customs and administrative officials to obtain (1) reduced tax obligations; (2) importation of construction equipment in violation of customs regulations; (3) customs clearance for goods and equipment; (4) immigration and tax benefits; and (5) a beneficial tax audit.

The Fifth Circuit's decisions thus have greatly exacerbated compliance and investigative costs by extending the FCPA's coverage to essentially any contact between a company, or its agents and representatives, and any foreign government official. Instead of devoting compliance resources to prevent bribes to government officials to obtain or retain business, companies are being forced to expend vast amounts of time and money policing nearly every interaction—no matter how insignificant—with foreign officials, employees of state run enterprises, and virtually anyone who might in some way have influence with a foreign government. U.S. businesses are also

---

[9] *See* News Release, *Monsanto Announces Settlements With DOJ and SEC Related to Indonesia* (Jan. 6, 2005), *available at* http://Monsanto.mediaroom.com/index.php?s=43&item=278.

[10] *See SEC v. Dow Chem. Co.*, No. 07-cv-336 (D.D.C. filed Feb. 12, 2007).

[11] *United States v. Halford*, No. 01-cr-00221-SOW-1 (W.D. Mo. filed Aug. 3, 2001); *United States v. Reitz*, No. 01-cr-00222-SOW-1 (W.D. Mo. filed Aug. 3, 2001); *United States v. King*, No. 01-cr-0190-DW (W.D. Mo. filed June 27, 2001).

significantly hampered in their ability to rely on local agents, such as customs agents, whose services may as a practical matter be essential (or even required by local law) to navigating unfamiliar regulatory environments, but whose behavior cannot be completely controlled. And these third party representatives are a huge source of potential liability because the FCPA explicitly makes businesses liable both for conduct they authorize and conduct as to which they are willfully blind or deliberately ignorant. 15 U.S.C. § 78dd-1(f)(2). To avoid allegations of willful blindness, companies subject to the FCPA must devote considerable resources to vetting and monitoring third parties and documenting that they have done so. Again, while such compliance activity is appropriate in the sales agent context, *Kay* vastly expands the universe of third parties that must get this enhanced scrutiny, far beyond the statutory purpose of preventing companies from buying business.

C. The Business Community Needs This Court's Guidance

At a minimum, U.S. businesses need guidance about the substantive scope of the FCPA. Although enforcement actions continue to increase, there is little official guidance on how to comply with the FCPA. There are no implementing regulations or guidelines issued by the DOJ or SEC with respect to the FCPA's "business nexus" provision.

> In-house and outside counsel for U.S. corporations doing business abroad therefore must navigate through the extraterritorial application of a U.S. criminal bribery statute with unclear standards, in the context of complex and sensitive foreign business

> relationships, and in an environment where illicit payments are a common business practice of foreign competitors.

Donald Zarin, *Introduction* to *The FCPA in 2008: Not the Statute You May Have Thought It Was, reprinted in* The Foreign Corrupt Practices Act 2008: Coping with Heightened Enforcement Risks 20 (Lucinda A. Low et al. eds., 2008).

This uncertainty can place American businesses at a significant competitive disadvantage, by chilling vigorous competition that may in fact be consistent with a proper interpretation of U.S. law. As early as 1981, the Senate Committee on Banking, Housing and Urban Affairs proposed amendments to the FCPA because "the lack of clarity in the [FCPA's] provisions, and the incorporation into the statute of standards which are not realistic in the practical world in which international commerce operates" had led to "excessive" "lost opportunities of U.S. businesses." S. Rep. No. 97-209, at 3 (1981).[12] Better clarity about the substantive requirements of the FCPA is particularly

---

[12] *See, e.g.*, Business Accounting and Foreign Trade Simplification Act: Joint Hearings on S. 708 Before the Subcomm. on Sec. and the Subcomm. on Int'l Fin. & Monetary Policy of the Comm. on Banking, Housing and Urban Affairs, 97th Cong. 1 (1981) ("The Foreign Corrupt Practices Act has been the source of a great deal of confusion and uncertainty in the business community.") (statement of Chairman D'Amato); Business Accounting and Foreign Trade Simplification Act: Joint Hearing on S. 430 Before the Subcomm. on Int'l Fin. & Monetary Policy and the Subcomm. on Sec. of the Comm. on Banking, Housing, and Urban Affairs, 99th Cong. 1 (1986) ("Complaints from the American business community about the vague and confusing definitions and enforcement provisions in the FCPA have continued unabated since the FCPA became law in 1977.") (statement of Chairman Heinz).

essential for smaller enterprises that lack the resources of a Fortune 500 company and cannot realistically implement the comprehensive and costly compliance plans that the government has become so fond of. In addition, it is not just U.S. businesses that are covered. Because the FCPA's anti-bribery provisions extend to U.S. "issuers," companies whose securities trade publicly in the United States, any company in the world that chooses to list securities in our markets is subject to the full scope of the FCPA, as defined in *Kay*. At a time when U.S. capital markets are facing increasing global competition, an unbounded criminal statute that is being aggressively prosecuted is hardly helpful.

The absence of conflicting circuit precedent on the specific language of the FCPA is no reason to defer review. This has been the landmark case for the substantive interpretation of the FCPA's "business nexus" requirement, and has effectively become the law nationwide. And it is not realistic to expect that the Fifth Circuit's interpretation will be the subject of substantial litigation in the near future. Because of the enterprise-threatening risks associated with any criminal indictment of a business enterprise, the government is able to force "increasingly onerous settlements that companies are compelled to accept." Sokenu, *supra* at 132. Litigating with the government in a criminal context simply is not a viable option for business enterprises in most circumstances. *See* Low, *supra* at 77. And, as the petition explains, this case presents several collateral legal issues that have divided the lower courts.

CONCLUSION

The petition for certiorari should be granted, and the judgment should be reversed.

Respectfully submitted,

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H STREET, N.W.
WASHINGTON, D.C. 20062
(202) 463-5337

J. SCOTT BALLENGER
Counsel of Record
DOUGLAS N. GREENBURG
NATHAN H. SELTZER
LATHAM & WATKINS LLP
555 11TH STREET, N.W.
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200

Counsel for Amicus Curiae

93

(3)

No. 07-1281

FILED

MAY 12 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

DAVID KAY and DOUGLAS MURPHY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JEFFREY T. GREEN
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
(202) 736 8000

JOHN D. CLINE
Counsel of Record
PETER E. DAVIDS
JONES DAY
555 California Street
26th Floor
San Francisco, CA 94104
(415) 626-3939
Counsel for Amicus Curiae National Association of Criminal Defense Lawyers

QUESTIONS PRESENTED

1. When an indictment omits an element of the offense, must it be dismissed, or may such an error instead be excused as harmless?

2. When the text, structure, and legislative history of a criminal statute are all ambiguous, is the rule of lenity applicable, or instead is that principle limited merely to cases in which the court can only "guess" at Congress's intent?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

ARGUMENT 2

CONCLUSION 8

TABLE OF AUTHORITIES

FEDERAL CASES

Burgess v. United States, 128 S. Ct. 1572 (2008) 2

Cleveland v. United States, 531 U.S. 12 (2000) 5

McBoyle v. United States, 283 U.S. 25 (1931) 6

Neder v. United States, 527 U.S. 1 (1999) 3

Russell v. United States, 369 U.S. 749 (1962) 2

Scheidler v. NOW, 537 U.S. 393 (2003) 5

Stirone v. United States, 361 U.S. 212 (1961) 2

United States v. Allen, 406 F.3d 940 (8th Cir. 2005) (en banc), *cert. denied*, 127 S. Ct. 826 (2006) 4

United States v. Du Bo, 186 F.3d 1177 (9th Cir. 1999) 3, 4

United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) 3

United States v. Granderson, 511 U.S. 39 (1994) 5

United States v. Higgs, 353 F.3d 281 (4th Cir. 2003) 4

United States v. Kay, 513 F.3d 432 (5th Cir. 2007), *modified*, 513 F.3d 461 (5th Cir. 2008) 4

United States v. Kay, 359 F.3d 738 (5th Cir. 2004) 4

United States v. Laton, 352 F.3d 286 (6th Cir. 2003) 7

United States v. R.L.C., 503 U.S. 291 (1992) 5, 6, 7

United States v. Resendiz-Ponce, 549 U.S. 102 (2007) 1, 2

Washington v. Recuenco, 548 U.S. 212 (2006) 4

CONSTITUTIONS, STATUTES, AND RULES

U.S. Const. Amend. V 2

15 U.S.C. § 78dd-1(a)(1) 4

15 U.S.C. § 78dd-2(a)(1) 4

Sup. Ct. R. 37.2 1

Sup. Ct. R. 37.6 1

INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization of more than 11,500 attorneys, in addition to more than 28,000 affiliate members from all fifty states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the role and duties of lawyers representing parties in administrative, regulatory, and criminal investigations. In furtherance of this and its other objectives, NACDL files a number of amicus curiae briefs each year, addressing a wide variety of criminal justice issues.

NACDL has recently submitted amicus briefs to this Court on aspects of the questions presented

---

[1] Under Sup. Ct. R. 37.6, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for all parties received notice of NACDL's intention to file this amicus brief ten days before the due date. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court under Rule 37.2(a).

here. In *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007), NACDL contended that the omission of an element of a criminal offense from a federal indictment cannot constitute harmless error. In *Burgess v. United States*, 128 S. Ct. 1572 (2008), NACDL urged application of the rule of lenity to federal mandatory minimum sentences. In *Resendiz-Ponce*, the Court found that the indictment contained all elements of the charged offense and thus did not reach the harmless error question. In *Burgess*, the Court found the text of the statute unambiguous and thus did not address application of the rule of lenity. NACDL continues to believe that these issues are central to the federal criminal justice system. It views this case as an opportunity to resolve the important questions left undecided in *Resendiz-Ponce* and *Burgess* and to provide essential guidance to courts and litigants.

ARGUMENT

1. NACDL supports the petition here because the majority view in the circuits--that the omission of an element from an indictment may be harmless error--presents a fundamental threat to the "substantial right to be tried only on charges presented in an indictment returned by a grand jury." *Stirone v. United States*, 361 U.S. 212, 217 (1960); *see, e.g., Russell v. United States*, 369 U.S. 749, 770 (1962) (vague indictment deprives the defendant "of a basic protection which the guaranty of the intervention of a grand jury was designed to secure"). If courts are permitted to surmise after the fact what the grand jury *would have found* if presented with a proper indictment, or *must have*

found based on the evidence before it, the Fifth Amendment right not to be tried for serious offenses except on indictment by the grand jury will be significantly weakened.

The omission of an element of an offense from the indictment constitutes "structural error," as this Court has explained that term, and thus cannot be reviewed for harmless error. *See, e.g., United States v. Du Bo*, 186 F.3d 1177, 1179-80 (9th Cir. 1999). Omission of an element has each of the three characteristics that, alone or in combination, cause an error to be "structural": the omission has consequences that are necessarily difficult to assess, especially given the secrecy that shrouds grand jury proceedings, *see id.* at 1179; it necessarily renders the criminal proceeding fundamentally unfair, because it permits the defendant to be "held to answer" at trial without having been charged with an offense by the grand jury, *see id.* at 1180; and the harmless error inquiry is irrelevant to remedying the constitutional error, because the interest to be protected does not necessarily turn upon the ultimate reliability of the grand jury or trial proceeding, *see id.* at 1180 n.2. *See generally United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006) (addressing grounds for finding structural error).

The courts that have applied harmless error analysis to indictments that omit an element of the offense have taken too crabbed a view of what constitutes "structural error." Those courts have generally concluded that because this Court held in *Neder v. United States*, 527 U.S. 1 (1999), that

failure to instruct the petit jury on an element of the offense may constitute harmless error, it necessarily follows that the omission of an element from the indictment may be harmless. *See, e.g., United States v. Allen*, 406 F.3d 940, 943-45 (8th Cir. 2005) (en banc), *cert. denied*, 127 S. Ct. 826 (2006); *United States v. Higgs*, 353 F.3d 281, 304-07 (4th Cir. 2003). But *Neder* and similar cases address the "commission of a constitutional error at trial alone." *Washington v. Recuenco*, 548 U.S. 212, 218 (2006). Those cases do not consider the unique role of the grand jury in our constitutional structure or the critical differences between grand jury and trial proceedings. *See Du Bo*, 186 F.3d at 1180 n.2. We respectfully urge the Court to take the opportunity that this case presents to address the application of "structural error" in the grand jury context.

2. This case affords an excellent vehicle for the Court to resolve the uncertainty in its own decisions and in the lower courts over proper application of the rule of lenity. The Fifth Circuit found that the text of the so-called "business nexus" requirement in 15 U.S.C. § 78dd-1(a)(1) and -2(a)(1) is ambiguous. Resorting to snippets of legislative history, however, including the legislative history of amendments to the FCPA that Congress declined to adopt,[2] the court of appeals refused to apply the rule of lenity. The court found the rule applicable only where, "after seizing everything from which aid can be derived, a court can make no more than a guess as to what Congress intended." *United States v.*

[2] *See United States v. Kay*, 359 F.3d 738, 752-53 (5th Cir. 2004).

Kay, 513 F.3d 432, 445 (5th Cir. 2007) (quotation and brackets omitted), *modified on other grounds*, 513 F.3d 461 (5th Cir. 2008). This case thus squarely presents the question whether the rule of lenity applies as a "last resort," when the court's only alternative is to "guess" at the meaning of the statute, as the court of appeals held, or, by contrast, whether the rule applies whenever the "text, structure, and history [of the statute] fail to establish that the Government's position is unambiguously correct." *United States v. Granderson*, 511 U.S. 39, 54 (1994); *see, e.g., Scheidler v. NOW*, 537 U.S. 393, 409 (2003); *Cleveland v. United States*, 531 U.S. 12, 25 (2000).

This case also offers the opportunity to resolve a more fundamental question: whether courts can *ever* resort to legislative history to resolve ambiguity in the statutory text, or whether instead the rule of lenity applies (and bars resort to legislative history) whenever the text of a penal statute remains ambiguous after the court has applied all available canons of statutory construction. Because the relevant statutory text is indisputably ambiguous here, the rule of lenity requires that the business nexus element be interpreted in petitioners' favor unless, as the court of appeals held, resort may first be had to legislative history.

Three Justices of this Court have declared that "it is not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history." *United States v. R.L.C.*, 503 U.S. 291, 308 (1992) (Scalia, J., joined by Kennedy

and Thomas, JJ., concurring in the judgment); *see id.* at 311 (Thomas, J., concurring in the judgment) (agreeing that "the use of legislative history to construe an otherwise ambiguous penal statute against a criminal defendant is difficult to reconcile with the rule of lenity," but emphasizing that courts may use "well-established principles of statutory construction" in determining whether text is ambiguous) (quotation omitted). The plurality in *R.L.C.*, consisting of Chief Justice Rehnquist and Justices White, Stevens, and Souter, concluded that Justice Scalia's view of the rule of lenity "is an issue that is not raised and need not be reached in this case." *Id.* at 306 n.6.

The issue left unresolved in *R.L.C.*--whether the rule of lenity precludes resort to legislative history when the statutory text is ambiguous--is squarely presented here. That issue goes directly to the core purpose of the rule. "'The rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal.'" *R.L.C.*, 503 U.S. at 309 (Scalia, J., joined by Kennedy and Thomas, JJ., concurring) (quoting *Liparota v. United States*, 471 U.S. 419, 427 (1985)); *see, e.g., McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.) (before imposing criminal punishment, "it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.").

Presuming knowledge of the text of the criminal code is consistent with the principle of fair

warning embodied in *McBoyle* and its progeny. The code is readily available to lawyers and nonlawyers alike; anyone who wishes to do so may consult potentially applicable penal statutes before acting. Legislative history, by contrast, is often inaccessible to nonlawyers and--as this case well illustrates--may itself be open to varying interpretations. More fundamentally, statutes have the force of law, knowledge of which must generally be presumed in any ordered society; legislative history does not. "[B]ecause no one can plausibly conclude that a committee report or the floor statements of selected legislators provides [fair warning], the use of such material seems utterly incompatible with the rule [of lenity] or the civilized interests it protects." *United States v. Laton*, 352 F.3d 286, 314 (6th Cir. 2003) (Sutton, J., dissenting); *see R.L.C.*, 503 U.S. at 309 (Scalia, J., joined by Kennedy and Thomas, JJ., concurring in the judgment) ("It may well be true that in most cases the proposition that the words of the United States Code or the Statutes at Large give adequate notice to the citizen is something of a fiction . . . albeit one required in any system of law; but necessary fiction descends to needless farce when the public is charged even with knowledge of Committee Reports.").

Moreover, descents into legislative history, as this case illustrates, are certain to render the rule of lenity a practical nullity. The malleability of legislative history will nearly always provide some basis, however tenuous, to conclude that ambiguous statutory language can be stretched to cover the defendant's alleged conduct, especially when the alternative is a reversal of a conviction on due

process grounds. Allowing the use of legislative history to resolve textual ambiguity in penal statutes therefore invites result-oriented decisions and a continual expansion of criminal liability.

Because of the importance of the rule of lenity in preserving the principle of fair warning and the uncertainty that now surrounds its application in the federal criminal system, we submit that the Court should grant the writ and use this case to provide the needed clarity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN D. CLINE
Counsel of Record
PETER E. DAVIDS
Jones Day
555 California St., 26th Floor
San Francisco, CA 94104
(415) 626-3939

JEFFREY T. GREEN
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Amicus Curiae
National Association of
Criminal Defense Lawyers

May 2008

Supreme Court, U.S.
FILED
OCT 3 1 2008
OFFICE OF THE CLERK

No. 07-1281

IN THE

Supreme Court of the United States

DAVID KAY AND DOUGLAS MURPHY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR REHEARING

Reid H. Weingarten
Bruce C. Bishop
David M. Fragale
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., NW
Washington, DC 20036
Counsel for David Kay

Thomas C. Goldstein
Counsel of Record
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000
Counsel for Douglas Murphy

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

PETITION FOR REHEARING

Petitioners respectfully petition this Court to grant rehearing of the denial of their petition for a writ of certiorari on October 6, 2008.

GROUNDS FOR REHEARING

Petitioners seek rehearing to allow the Court to dispose of their certiorari petition in light of the Court's forthcoming decision in *Flores-Figueroa v. United States*, No. 08-108. The Court's decision in *Flores-Figueroa*—in which review was granted two weeks after the denial of certiorari in this case—is likely to address one of the questions raised in the petition in this case.

1. The factual and procedural history of this case are set forth in the petition for certiorari (at 2-11). In summary, petitioners were convicted for violating a provision of the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. §§ 78dd-1(a)(1), 78-dd-2(a)(1), by arranging for bribes to be paid to Haitian Customs officials in exchange for lowering taxes on imported rice.

The relevant provision of the FCPA prohibits the payment of bribes to a foreign official to induce official action "to assist [a covered American business] in obtaining or retaining business for or with . . . any person." 15 U.S.C § 78dd-1(a)(1). The district court initially dismissed the indictment against petitioners on the ground that a bribe directed at obtaining beneficial tax treatment is not a bribe to assist in "obtaining or retaining business" within the meaning of the Act. Pet. App. 120a.

On appeal, the Fifth Circuit reversed. The court of appeals acknowledged that the statutory text, viewed in light of the statutory structure and the provision's title, was "ambiguous as a matter of law." Pet. App. 67a. The court then closely examined the drafting and legislative history of the FCPA. It found nothing directly on point, but discerned from various indications in the legislative history a generalized intent to broadly proscribe bribery of foreign officials. *See* Pet. 4-7. In the end, the court concluded that "[g]iven the foregoing analysis of the statute's legislative history," it could not "hold as a matter of law that Congress meant to limit the FCPA's applicability to cover only bribes that lead directly to the award or renewal of contracts." Pet. App. 88a. The court declined, however, to decide whether that conclusion could be applied to this case in light of the rule of lenity, leaving the district court to address that question on remand. Pet. App. 100a n.96.

Upon remand, petitioners renewed their rule of lenity argument, which the district court rejected. Petitioners were subsequently convicted and appealed again.

On the second appeal, the Fifth Circuit rejected petitioners' argument that the admittedly ambiguous terms of the FCPA should be construed so as not to criminalize their conduct under the rule of lenity, applying circuit precedent which has reserved application of lenity to cases in which, "after seizing everything from which aid can be derived, [the court] can make no more than a guess as to what Congress intended." Pet. App. 16a.

2. The petition for certiorari asked this Court to decide whether the rule of lenity is limited to cases in

which a court can only "guess" at Congress's intent. Pet. i. This Court denied the petition on October 6, 2008.

3. Two weeks later, the Court granted the petition in *Flores-Figueroa v. United States*, No. 08-108 (cert. granted October 20, 2008). The petition in that case presents the question "[w]hether, to prove aggravated identity theft under 18 U.S.C. § 1028A(a)(1), the Government must show that the defendant knew that the means of identification he used belonged to another person." *See* Pet. i, *Flores-Figueroa v. United States*. The petition explains that the courts of appeals have divided over the question, in large part due to the fact that two circuits have found the language of that statutory provision sufficiently ambiguous to warrant application of the rule of lenity, while three others have refused to apply the doctrine to the construction of Section 1028A(a)(1). *Id.* at 10-11. One of the decisions giving rise to the circuit conflict in *Flores-Figueroa* is discussed at length by the Petition for Certiorari in this case as embodying the conflict between the respective interpretations of the rule of lenity by the D.C. and Fifth Circuits. *See* Pet. 24, *Kay v. United States* 24 (discussing *United States v. Villanueva-Sotelo*, 515 F.3d 1234 (D.C. Cir. 2008). In another, *United States v. Miranda-Lopez*, 532 F.3d 1034, 1040 (9th Cir. 2008), the Ninth Circuit held—in direct conflict with the rule in the Fifth Circuit—that the rule of lenity applies to "resolve *any* ambiguity in the scope of the criminal statute," unless it would "require an interpretation that 'conflict[s] with the implied or expressed intent of Congress.'" *Id.* at 1040 (citation omitted).

4. The proper threshold of ambiguity to trigger application of the rule of lenity may be resolved—or at least be the subject of significant further guidance from this Court—in *Flores-Figueroa*. One of the petitioner's principal arguments in *Flores-Figueroa* is that the rule of lenity requires a ruling in his favor because the statutory text and structure is ambiguous and other indicia of legislative intent do not decisively resolve the ambiguity in the Government's favor. *See* Pet. 21, 27-28, *Flores-Figueroa v. United States*. And the Government has made clear, in its response to the petition in this case (BIO 15), that it views the Fifth Circuit's view of lenity—as limited to cases in which a statute is so hopelessly ambiguous that a court may only guess at its meaning—to be the correct one.

This Court's analysis of the rule of lenity in *Flores-Figueroa* is likely to have jurisprudential significance that will provide the lower courts with importance guidance in a range of cases, including this one. To date, the Court has articulated two competing standards for applying the rule of lenity. As the Petition in *Flores-Figueroa* explains (at 27), decisions such as *United States v. Bass*, 404 U.S. 336, 347 (1971), hold that in cases of ambiguity in criminal statutes, "it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." By contrast, as the United States urges in its Brief in Opposition in this case (at 15), the Court has also stated in cases such as *Ladner v. United States*, 358 U.S. 169, 178 (1958), that the "policy of lenity means that the Court will not interpret a federal criminal statute [more harshly] . . . when such an interpretation can be based on no more than

a guess as to what Congress intended." The Fifth Circuit takes *Ladner*'s latter formulation *literally*, and disposed of the case on that basis. *See* Pet. 8.

There is no serious doubt that if this Court retains the *Bass* formulation and rejects strict application of the latter formulation from *Ladner* the judgment in this case must be reversed. As the Petition explains, even the court of appeals acknowledged that the statute under which petitioners were convicted "is ambiguous as a matter of law"; it held that it could "avoid the rule of lenity" only because the task of statutory construction was not reduced to mere "guesswork." Pet. App. 6a, 16a.

5. While rehearing is disfavored and rarely granted, the exception to that principle is that this Court has regularly granted rehearing when a previously denied petition raised a question related to the issues decided a case granted review shortly thereafter. In such cases, the Court has granted the petition for rehearing, vacated the prior denial of certiorari, granted the petition, vacated the judgment, and remanded the case for reconsideration in light of the Court's new precedent. *See, e.g.*, *Hawkins v. United States*, 543 U.S. 1097 (2005); *Criston v. United States*, 543 U.S. 1117 (2005); *Soto v. United States*, 543 U.S. 1117 (2005); *Jimenez-Velasco v. United States*, 542 U.S. 1116 (2005); *Friend v. United States*, 517 U.S. 1152 (1996); *Fuentes v. United States*, 516 U.S. 1022 (1995); *Adams v. Evatt*, 511 U.S. 1001 (1994); *Hitchcock v. Florida*, 505 U.S. 1215 (1992); *West v. Northwest Airlines, Inc.*, 505 U.S. 1201 (1992); *Booker v. Mississippi*, 472 U.S. 1023 (1985).

The same course of action is appropriate here. While the rule of lenity question in *Flores-Figueroa* arises with respect to a different statute, this Court's decision could well render untenable the Fifth Circuit's exceedingly narrow conception of the rule's application to any ambiguous criminal statute. As described in the petition in this case, if that narrow conception cannot stand, neither can petitioners' convictions. *See* Pet. 27-32.

Rehearing is particularly warranted given the importance of this case and the negative consequences of the Fifth Circuit's judgment for the American business community, as the two *amicus* briefs in support of the Petition attest. The brief of the U.S. Chamber of Commerce in particular demonstrates that the Fifth Circuit's decision in this case radically expands the extraterritorial sweep of the FCPA in a manner that could not reasonably have been anticipated and that has significant adverse effects on American industry.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted,

Reid H. Weingarten
Bruce C. Bishop
David M. Fragale
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., NW
Washington, DC 20036
Counsel for David Kay

Thomas C. Goldstein
Counsel of Record
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000
Counsel for Douglas Murphy

October 31, 2008

CERTIFICATE OF COUNSEL

Counsel certifies that the foregoing petition for rehearing is restricted to the grounds specified in Supreme Court Rule 44.2 and is presented in good faith and not for delay.

Bruce C. Bishop
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., NW
Washington, DC 20036
Counsel for David Kay

Thomas C. Goldstein
Counsel of Record
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000
Counsel for Douglas Murphy